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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-863

COLUMBIA BROADCASTING SYSTEM, INC., *Petitioner,*

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL., *Respondents.*

No. 71-864

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES, *Petitioners,*

v.

BUSINESS EXECUTIVES' MOVE FOR VIETNAM PEACE AND DEMOCRATIC NATIONAL COMMITTEE, *Respondents.*

No. 71-866

AMERICAN BROADCASTING COMPANIES, INC., *Petitioner,*

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT DEMOCRATIC NATIONAL COMMITTEE

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BRIEF FOR RESPONDENT DEMOCRATIC NATIONAL COMMITTEE

OPINIONS BELOW

The opinion of the Court of Appeals (App. 446) is reported at 450 F.2d 642 (1971). The opinion of the Federal Communications Commission (App. 247) is

reported at 25 F.C.C. 2d 216 (1970). The opinion of the Federal Communications Commission in *Business Executives' Move for Vietnam Peace* (App. 357) is reported at 25 F.C.C. 2d 242 (1970).

JURISDICTION

The judgment of the Court of Appeals (App. 492) was entered on August 3, 1971. Petitions for rehearing were denied October 4, 1971 (App. 494). Petitions for certiorari were filed January 3, 1972, and granted February 28, 1972 and the cases consolidated with No. 71-865. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the First and Fifth Amendments and of the Communications Act are set forth in the Addendum, pp. 1a-4a, *infra*.

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission may, consistently with the provisions of the Communications Act of 1934 that it promote the public interest and not interfere with the right of free speech, approve an absolute ban of all radio and television broadcasts paid for by a national political party on issues of public importance, while at the same time broadcast licensees accept paid advertisements on subjects which they do not deem "controversial."

2. Whether the Federal Communications Commission's approval of such an absolute ban on broadcasts paid for by a national political party is consistent with the First and Fifth Amendments.

STATEMENT

On May 19, 1970 the Democratic National Committee (DNC), governing body of the National Democratic Party between conventions, filed with the Federal Communications Commission a request for a declaratory ruling under 5 U.S.C. § 554(e). (App. 15.) The request stated that the DNC was planning a nationwide fundraising campaign as part of which it desired to purchase program and spot announcement time, at regular rates, on individual radio and television stations and on national networks. The planned paid-for presentations would be devoted in some cases to solicitation of funds, in others to presenting the DNC's views on issues of public importance. (App. 16-17.) The DNC stated that "In 1970 America, this is the only way the DNC can effectively reach large numbers of small contributors to the extent necessary to satisfy its indebtedness and to promote adequately its candidates and causes." (App. 16.)

The DNC noted that the CBS television network had already refused a DNC request to purchase a one-half hour segment of prime time for a program on current issues which would have included an appeal for funds, and that a CBS executive had said that no time would be sold "for presenting currently controversial points of view" except during an undefined period of "election campaigns." (App. 22-23.) It also stated that the ABC network and numerous individual broadcast licensees refuse as a general policy to sell time for fund solicitations. (App. 23-24.) In addition, it had discovered that the 509 commercial VHF television stations, 180 commercial UHF television stations, 4,280 standard broadcast stations, and 2,111 commercial FM stations followed a variety of policies. Some of these broadcast

licensees would ban purchase of time by the DNC because fund solicitation was involved; some because the broadcasts would contain "controversial material on a major political issue of the day;" some because no "election campaign" was currently in progress. (App. 24-25.) The DNC said that because of the uncertainty resulting from these varying prohibitions, without clarification from the Commission it would not be in a position to proceed with its planned broadcasts. (App. 22.)

The DNC informed the Commission that it did "not contend, that broadcasters are precluded from establishing reasonable restrictions regarding the use by others of the facilities for which they hold licenses." (App. 28.) It stated that "it is not necessary for the Commission to rule that a broadcaster must present programs or announcements of any particular nature proffered by any particular concern." (App. 33.) The DNC requested the Commission to rule that "a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as the DNC, for the solicitation of funds and for comment on public issues," or alternatively that any such general policy would be considered adversely to a broadcast licensee in evaluating its service of the public interest. (App. 33-34.)

The Commission requested comments from the three major broadcasting networks. (App. 35-38.) ABC replied that

> "ABC will determine what subjects are of such interest or importance as to warrant time for their presentation. ABC will also decide whether it will present a contrasting viewpoint itself, or if not, which individuals or organizations seeking time are best qualified to discuss a subject chosen for

broadcast treatment or are most representative of a viewpoint selected for presentation.

"In short, absent special public issue considerations, ABC will not sell time for comment on controversial issues or for solicitation of funds." (App. 45.)[1]

CBS stated that there was a "long standing CBS policy not to sell time for the expression of viewpoints on public issues" (App. 51), except for "broadcasts on behalf of political candidates or in connection with ballot propositions" (App. 57.)[2] It commented that "A policy of selling time to partisans would in our view necessarily distort the manner in which issues were presented to the listening and viewing public," possibly resulting in "one-sided presentations designed to persuade rather than to inform." (App. 51, 60.) CBS said that its own news organization had "a well-deserved reputation for fairness and objectivity," that it "has long maintained policies which in general provide that broadcasts dealing with current controversial issues be produced under the supervision and control of CBS News or a CBS Owned station," and that "only by lodging these responsibilities with our own personnel can we effectively insure that objectivity and fairness will actually be achieved." (App. 50-51.) It cited as its "fundamental conviction" the view that what the public needs is "some sensemaking whole" provided by CBS, and that this "demands the interven-

[1] ABC added, without elaboration, that it would be prepared to accept orders from major political parties to the extent they could be accommodated on a reasonable basis. (App. 46.)

[2] CBS stated that it would permit political parties to purchase "a special category of spot announcements (i.e. up to one minute in length) for the purpose of political fund-raising." (App. 58.)

tion of professional journalists between the event and the public." (App. 56-57.)[3]

NBC advised the Commission that it had no policy preventing sale of program time in the circumstances outlined by the DNC.

On August 5, 1970, the Commission adopted an opinion and order. (App. 247-273.) The Commission acknowledged that

> "DNC notes that it is seeking not a ruling which would require a broadcaster to accept particular programs or announcements, but only that broadcasters may not establish arbitrary barriers to access by responsible groups. . . . " (App. 250-251.)

The Commission rejected DNC's request with respect to purchase of time to discuss public issues. (App. 273.) One Commissioner concurred separately and one dissented. (App. 273-287.) The Commission treated DNC's request insofar as it pertained to time for fundraising as separable, and held that where fundraising was concerned, "arbitrary policies with respect to the sale of broadcast time to significant political parties for the solicitation of funds" were not permissible. (App. 272-273.)[4]

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[3] To demonstrate its scheduled coverage of news and "important subjects" in addition to "hard news" programs and special broadcasts, CBS enumerated the weekly "Face the Nation," the monthly "60 Minutes," "Look Up and Live," and "Lamp Unto My Feet," as well as its subsidiary WCBS-TV's "Newsmakers." (App. 51-52.) It also included a lengthy exhibit of excerpts from news broadcasts and editorials on the Vietnam War (App. 81-242.) See n.66, *infra*.

[4] The Commission made no findings with respect to whether CBS, ABC, or any other network or licensee had met its general statutory obligations of fairness and serving the public interest.

The DNC then brought a petition for review against the Federal Communications Commission and the United States in the United States Court of Appeals for the District of Columbia Circuit. (App. 421.) CBS (App. 428) and ABC (App. 426) intervened in the action. The case was consolidated with a petition for review of the Commission's decision in *Business Executives' Move for Vietnam Peace (BEM)* rendered the same day.[5]

The Court of Appeals, one judge dissenting, reversed the Commission decision. Relying especially on this Court's decision in *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969), the court held that an absolute and arbitrary ban on the purchase of time for discussion of public issues violated First Amendment principles embodied both in the Amendment itself and in the "fairness and public interest requirements" of the Communications Act of 1934. (App. 449, 455.) The Court of Appeals summarized its holding in these words:

> "The actual issue before us is relatively narrow and we decide it narrowly. . . . [W]e leave undis-

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[5] 25 F.C.C. 2d 242 (1970). BEM sought to purchase time from WTOP, a broadcast licensee serving the Washington, D.C. area, for messages concerning the Vietnam War, and was informed that "it is the policy of Post-Newsweek Stations radio and television stations not to sell spot announcement time to any individuals or groups in order to set forth a point of view on any controversial subject of public importance." App. 297. The BEM case was consolidated with the DNC's in the Commission's petition for certiorari in No. 71-864. The intervenors, CBS and ABC, filed petitions for certiorari in Nos. 71-863 and 71-866, respectively. In addition, Post-Newsweek Stations, Capital Area, Inc., intervened in the petition for review of the Commission's *BEM* order (App. 430), and filed the petition for certiorari in No. 71-865. The DNC is not a party in No. 71-865.

turbed the licensee's basic right to exercise judgment and control in public issue programming and the sale of advertising time. All we do is forbid an *extreme* form of control which totally excludes controversial public debate from broadcast advertising time.

We hold specifically that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted. We do not hold, however, that the planned announcements of the petitioners—or, for that matter, of any other particular applicant for air time—must necessarily be accepted by broadcast licensees. Rather, we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many 'editorial advertisements' will be put on the air." (App. 449; emphasis in original.)

It said that "the Commission's and intervenor's argument might be somewhat stronger if it were designed to support a partial ban on editorial advertising concerning issues and views which have *in fact* been substantially aired on normal programming time. The argument is unconvincing, however, in support of a flat, *per se* ban on any and all editorial advertisements." (App. 471; emphasis in original.)[6]

Citing this Court's decision in *Red Lion Broadcasting Co.* v. *FCC, supra,* the Court of Appeals

[6] The Court of Appeals in its opinion did not distinguish between short "spot" announcements and longer presentations, but held simply that when some time was sold, it could not be arbitrarily denied to purchasers who wished to discuss public issues. App. 449. The DNC had cited to the Commission CBS's refusal to sell one-half hour of prime time. App. 22.

noted the unique role of television and radio in American political debate, and stated that the First Amendment interests of the public included not just passively receiving information, but also hearing debate by proponents in a vigorous, "wide-open" format. (App. 466-468.) It noted this Court's recognition of the role of political advertisements in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), and held that discrimination against such advertisements in favor of commercial advertisements by broadcast licensees as administrators of a valuable public resource "intimately bound to government and to service of the commonwealth," would be impermissible. (App. 467, 474, 461, 464.) Paid political broadcasts, said the court, are "a special and separate mode of expression, not simply a duplication of other expression on the same medium." (App. 468-469.)

The Court of Appeals observed that even if an individual is selected to be interviewed on a news program, "he may expect his comments to be abbreviated and edited; reporters' commentary will qualify what he has to say." (App. 468.) Free debate is enhanced, said the court, when sometimes a speaker has some control of his presentation, and "it has traditionally been thought that the best judge of the importance of a particular viewpoint or issue is the individual or groups holding the viewpoint and wishing to communicate to others." (App. 469.) The flat ban proposed by the Commission and the networks, said the court, "conforms instead to a paternalistic structure in which licensees and bureaucrats decide what issues are 'important,' how 'fully' to cover them, and the format, time and style of coverage." *(Ibid.)*

The only issue before it, said the court, was "a total, flat ban on editorial advertising." It reiterated that "all that petitioners condemn here are regulations providing that public issue advertising may be aired 'at no time, in no place and in no manner' over the broadcast media." (App. 483.) The court specified that broadcast licensees were not common carriers, and that it was not holding that they must sell time to anyone for any message of public interest. (App. 482.) It noted that the Commission might appropriately limit the purchase of time in many ways, as for example

— the total amount of time sold for discussion of public issues;

— the placement of paid announcements;

— the amount of time sold to particular groups or viewpoints;

— the need to protect broadcast licensees from financial harm;

— the need to assure overall fairness. (App. 484-486.)

Citing past experience, the court rejected the claim that sale of some time for discussion of public issues might be administratively inconvenient. It pointed out that the Commission in *United Broadcasting Co.*, 10 F.C.C. 515 (1945), had adopted and followed such a policy without any difficulty. (App. 487-488.) It noted that "although many broadcasters already do allow editorial advertisements on the air, we have not been shown one reason, based on their experience, to suggest that chaos has resulted." (App. 484.) The court expressed confidence in the ability of the Commission to develop reasonable guidelines (App. 485-486), and di-

rected that it do so (App. 488). When those guidelines were developed, DNC would be permitted to reapply to purchase time and permitted to do so, unless its request did not comply with the guidelines of the Commission. *(Ibid.)*

Judge McGowan in dissent noted that the court had held only that the Commission should make reasonable regulations which would not totally ban purchase of time for discussion of public issues. He said he thought the Commission's task was not easy, but he agreed that "it may well be that a detailed inquiry and investigation by the Commission of this area, by formal rulemaking or otherwise, would be both useful and consonant with the Commission's continuing obligation to see to it that the public interest obligations of licensees are being met in the most effective way." (App. 491.) He disagreed with the court's conclusion that a flat ban on sale of time for discussion of public issues was invalid on constitutional grounds.

The Court of Appeals denied petitions for rehearing (App. 494) and for stay of mandate (App. 496, 498). This Court on January 24, 1972, likewise denied a stay of mandate. Thereupon the Commission by public notice solicited comments on fashioning guidelines which would regulate paid broadcasts on public issues but not ban it completely.[7] On February 28, 1972, this Court granted certiorari and also stayed the mandate of the Court of Appeals. The Commission then withdrew its previous notice.[8]

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[7] *Handling of Public Issues Under the Fairness Doctrine*, 33 F.C.C. 2d 554 (1972).

[8] *Handling of Public Issues Under the Fairness Doctrine*, 33 F.C.C. 2d 798 (1972).

SUMMARY OF ARGUMENT

The issue in this case is whether the public airwaves—the dominant communications medium in the United States—are to be used by those who sell soap, brassieres, deodorants, and mouthwashes, but not by those who espouse political ideas.

The Federal Communications Commission ruled that radio and television broadcast licensees, although they sell time for commercial advertising, have no obligation whatsoever to let a national political party purchase time at the going commercial rate to discuss public issues. A ban on purchasing time for political fundraising, the Commission held, would be "arbitrary" and impermissible; a ban on purchasing time for political speech was not. The Court of Appeals reversed the latter part of the ruling, on a narrow basis: it held that no one of course has an absolute or unrestricted right to purchase time on the public's broadcast channels, but that for the Commission to uphold a total and arbitrary ban on the sale of *any* time for discussion of public issues violated both the Communications Act of 1934 and the First Amendment. The Court of Appeals remanded to the Commission to develop rules with reasonable restrictions which would not absolutely ban purchase of time for discussion of public issues, and which would accommodate the interests of both the broadcast licensees and the public.

Rarely have litigants before this Court taken a more extreme position than the broadcast licensees in this case. Without any reference to the rules the Commission is to promulgate—for the Commission has not yet done so—the licensees argue that *no one* is *ever* entitled to purchase *any* time to discuss public issues. *Cf. Times Film Corp.* v. *City of Chicago,* 365 U.S. 43 (1961). Their broadside attack is inconsistent both

with the Communications Act, as previously interpreted by the Commission, and with the decisions of this Court construing the First Amendment.

I.

The Commission utterly rejected the very claim which the licensees now assert the first time it was made. In the landmark *United Broadcasting* decision, it held that "operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues" was "inconsistent with the concept of public interest established by the Communications Act." 10 F.C.C. 515, 518 (1945). *United Broadcasting* was followed in many subsequent informal actions and rulings. Thus there is nothing new or untried in the Court of Appeals' holding; and indeed it appears that some licensees currently do sell time for discussion of public issues.

This "public interest" holding is buttressed by § 326 of the Act, which the Commission has held includes an affirmative duty to promote a system of free expression. It most certainly is not altered by the fact that the Act provides differing regulatory frameworks for common carriers of personal point-to-point messages in Title II, and broadcasting in Title III. No one is arguing that a radio station is a telephone company, and the court's narrow denial of the licensees' asserted absolute power does not make them such. The "large public aims," *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 218 (1943), of the Communications Act clearly incorporate the First Amendment's mandate that debate of public issues is to be encouraged, and is to be "uninhibited, robust, and wide-open." See *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964). If licensees may totally ban everyone from purchasing time to talk about public issues, that debate is diminished.

II.

From Mr. Justice Holmes' dissent in *Abrams* v. *United States,* 250 U.S. 616, 630 in 1919 to this Court's holding in *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, three years ago, this Court has reiterated that the central purpose of the First Amendment was to create a marketplace of ideas, especially for political topics. *Red Lion* held that that goal applies with undiminshed force to the broadcast media.

The broadcast licensees seek something different. They plan, in the words of one of them, to "intervene" at all times *between* the public and those who would address it. Although conceding that the First Amendment includes a right of the public to be informed, the licensees say that they alone will inform it.

No three men—not even the chief executives of the three major networks—can be permitted such power if the First Amendment is to have meaning today. Radio and television are the dominant medium in the United States. If the right to speak in public streets and parks, whose primary function is not communication, may not be arbitrarily denied, surely no less is true for the public's airwaves, which serve no other purpose. *Cf. Grayned* v. *City of Rockford,* 40 U.S.L. WEEK 4881 (U.S. June 26, 1972). As applied to a national political party, such restrictions interfere with the right of political association at the national level, and with the political parties' function of translating inchoate discontent into peaceful and constructive governmental action. If totally barred from paying for access to the one medium which most Americans see, groups may turn away from debate to non-peaceful methods of change. At the least, they will be encouraged to engage in conduct so bizarre that television cameras will cover it as "news."

Petitioners seek a constitutional inversion. They would exalt commercial speech (which this Court has held enjoys lesser constitutional protection) over political speech (which is at the core of the First Amendment). Such discrimination is inconsistent with the equal protection guarantees of the Constitution, as well as with the First Amendment. *Police Dept.* v. *Mosley,* 40 U.S.L. WEEK 4877 (U.S. June 26, 1972); *Grayned* v. *City of Rockford, supra.* Moreover, the standard which the licensees propose to use in banning speech—"controversial issues"—is so broad in its sweep, as well as vague in its meaning, that it is itself unconstitutional. *Ibid.*

No other medium is involved here. Broadcasting, this Court has said, is unique." *Red Lion, supra,* 395 U.S. at 390. The medium has been pervasively regulated since its infancy—so pervasively regulated that the Commission itself has suggested that it may be required to apply the Constitution even to licensees' employment practices. Broadcast licensees use, free of charge, a scarce resource which not only belongs to the public, but was actually created by the Congress, for a single purpose: to serve the public interest in communication.

The licensees now argue (with no support from the Solicitor General or the Commission) that because the Commission has adopted a ruling permissive in form, it is not a ruling subject to First Amendment restrictions. But such agency actions are routinely reviewed by courts to assure that the agency has complied with the Constitution and laws. Moreover, the status of the First Amendment is special. Like the Fifteenth Amendment, it protects the lifeblood of the govern-

mental process. Where speech is concerned, this Court has held that a federal licensee, even one whose primary function is not communications, is subject directly to the First Amendment when that licensee's governmentally approved actions affect speech. *Public Utilities Comm'n* v. *Pollak,* 343 U.S. 649 (1944). And just as a private group may not ignore the Fifteenth Amendment if it takes over the only effective access to the electoral process, neither may the broadcast licensees constrict access to the marketplace of political ideas—particularly when their ability to do so stems entirely from a federal grant of power. *Cf. Terry* v. *Adams,* 345 U.S. 461 (1953); *Smith* v. *Allwright,* 321 U.S. 649 (1944). Even when other constitutional provisions are invoked, many cases have held that when government provides property and intimately regulates an activity for public ends, certain basic constitutional safeguards attach to the use to which that property is put. See, *e.g., Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961).

This is not to say, of course, that *every* action by a licensee is subject to *every* constitutional restriction. And of course the licensees have legitimate First Amendment interests of their own. But the First Amendment will not tolerate monopolization of the broadcast spectrum, "whether it be by the Government itself or a private licensee." *Red Lion, supra,* 395 U.S. at 390. And if time is paid for at the full commercial rate, how is the licensee harmed? There are some limits in restricting the public's speech beyond which the licensees may not constitutionally go. The absolute power they seek here exceeds those limits.

In familiar fashion, the licensees warn that insuperable administrative difficulties will follow if their

claim of arbitrary power is denied. Nothing of the sort is true. The Court of Appeals specifically required the Commission to formulate a rule which would not allow anyone to buy disproportionate amounts of time, which would give weight to the overall public interest, and which would also protect the economic and editorial interests of the licensees. Many reasonable accommodations of these interests are possible. In any event, the right of political speech is not to be abridged because of imagined difficulties or for administrative convenience, and "there will be time enough to reconsider" if such extravagant fears are realized. *Red Lion, supra,* 395 U.S. at 393. The fact that the broadcast licensees thrived for many years without the arbitrary power they now seek suggests that the end of American broadcasting is not at hand. Were this Court to endorse their claims, however, the end of television's full potential for political speech in an electronic age might well be.

ARGUMENT

I. AN ARBITRARY AND ABSOLUTE BAN ON PURCHASE BY A NATIONAL POLITICAL PARTY OF RADIO AND TELEVISION TIME IS INCONSISTENT WITH THE COMMUNICATIONS ACT OF 1934.

It is a precept of this Court too long settled for argument that constitutional decisions are to be avoided where statutes can reasonably be construed to avoid them, and that the enactments of Congress are to be construed so as to harmonize with the Constitution whenever possible. See, *e.g., Ashwander* v. *TVA,* 297 U. S. 288, 346-348 (1936) (Brandeis, J., concurring).[9]

[9] Among numerous examples are *Schneider* v. *Smith,* 390 U.S. 17 (1968); *International Ass'n of Machinists* v. *Street,* 367 U.S. 740 (1961); *Greene* v. *McElroy,* 360 U.S. 474 (1959); *Kent* v. *Dulles,* 357 U.S. 116 (1958).

The Court of Appeals found in the Communications Act an alternative basis for its holding.[10] The right of a national political party not to be totally and arbitrarily barred from purchasing broadcast time at full commercial rates for discussion of public issues is recognized in the Communications Act of 1934, and is consistent with the Act's purpose, legislative history, and prior interpretation.

A. An Arbitrary and Absolute Ban on Paid Announcements of a Political Party is Inconsistent with the Communications Act's Requirement that Broadcast Licensees Serve the Public Interest, and with the Commission's Long-Standing Interpretation of that Requirement.

Petitioners imply that invalidating an absolute ban on purchase of time for political discussion requires broadcast licensees to pursue a new and untried policy. Nothing could be farther from the truth. Removal of the absolute ban simply returns broadcasting to the long-standing practice under the "public interest" mandate of the statute, a practice which broadcast licensees found tolerable for many years, and which at least one major network apparently has followed up to now.[11]

The Communications Act in five separate provisions directs the Federal Communications Commission to regulate broadcasting in such a way as to promote "the

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[10] "Whether our decision is styled as a 'First Amendment decision' or as a decision interpreting the fairness and public interest requirements [of the Communications Act] 'in light of the First Amendment' matters little." App. 455.

[11] NBC stated that it had "no policy" preventing sale of time to the DNC (App. 47). It now asserts that its willingness to sell time was an act purely "in the exercise of its discretion." Brief for Amicus Curiae at 3.

public convenience, interest, or necessity.'"[12] Until very recently the consistent position of the Commission when the issue has been squarely presented has been that the statutory "public interest" requirement prohibits licensees from totally banning purchase of time to discuss political issues. The assertion that licensees might do so was forcefully rejected by the Commission the first time it was made, and numerous subsequent decisions have reiterated that a broadcaster as a servant of the public interest cannot absolutely refuse to sell any time for broadcasts on subjects of public importance.

From the earliest days of radio, both advertisements[13] and discussions on a wide variety of controversial public issues[14] were common. Broadcast time

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[12] See 47 U.S.C. §§ 307(a), 309(a) (standard for licensing); U.S.C. § 307(d) (standard for renewing or modifying licenses); U.S.C. § 303(b) (standard for prescribing nature of service); U.S.C. § 303(r) (standard for determining when rules shall be promulgated). The Commission has held that the duty under U.S.C. § 303(b) to "prescribe the nature of the service to be rendered" by licensees means that "the Commission can and must require the achievement" of a broadcasting system which makes 'great contribution . . . to an informed public opinion on vital public issues of the day." App. 257.

[13] The first paid announcement was broadcast by station WEAF New York in 1922. G. ARCHER, HISTORY OF RADIO TO 1926, 275-397-99 (1938). Advertising was looked upon as at best a necessary evil, and an early policy statement of the National Association of Broadcasters stated that "commercial announcements, the term is generally understood, should not be broadcast between 7 and 11 p.m." *Hearings on S. 6 Before the Senate Committee on Interstate Commerce*, 71st Cong., 2d Sess. (1930); see *id.* at 1705 (President of NBC).

H. HETTINGER, A DECADE OF RADIO ADVERTISING 300 (1933).

was purchased especially often for political discussions, most often to promote candidacies.[15]

Then in 1939 the National Association of Broadcasters, a trade association of broadcast licensees, adopted a new "Code" which for the first time asserted an across-the-board policy of refusing to sell time for discussion of controversial subjects—though even then the NAB did not venture to assert a right to ban political broadcasts.[16] The provision read:

> "Time for the presentation of controversial issues shall not be sold, except for political broadcasts."[17]

The first major test of this new policy came when CBS refused to sell time to the Co-operative League of the United States, saying the network's policy was "not to sell time for programs devoted to public controversial issues." When the League raised a protest, however, CBS decided to accept the broadcasts.[18]

Soon afterward the F.C.C. rendered its *United Broadcasting* decision,[19] described by one historian of radio as "a memorable order which, in effect, threw the door open to the sale of time for the discussion of public issues."[20] The case arose when a licensee refused

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[15] *Cf.* 67 CONG. REC. 5483 (1926) (remarks of Mr. Celler complaining of charge of $10 per minute).

[16] "Political broadcasts, as defined, are excepted because 'at certain times the contending parties want to use and are entitled to use more time than broadcasters could possibly afford to give away." BILL, A STATEMENT FROM THE NAB CODE COMPLIANCE COMMITTEE 2 n.1 (1939).

[17] See BROADCASTING, July 15, 1939, p. 9.

[18] L. WHITE, THE AMERICAN RADIO 77-82 (1947).

[19] *United Broadcasting Co.*, 10 F.C.C. 515 (1945).

[20] L. WHITE, *supra* n. 18, at 80.

to sell broadcast time to a labor organization, citing its policy against selling time for "programs which solicit memberships, discuss controversial subjects, race, religion, and politics." After the case was brought to the attention of the Commission the licensee reversed its policy. In approving a consent order, the Commission explicitly rejected the very same arbitrary policy which petitioners argue for here:

> "The Commission . . . is of the opinion that the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues and that only charitable organizations and certain commercial interests may solicit memberships is inconsistent with the concept of public interest established by the Communications Act as the criterion of radio regulations . . ."[21]

Reaction to the decision was immediate.[22] In less than two months the NAB had amended its Code to delete the ban on sale of time for discussion of controversial issues.[23] Thereafter the Commission made sure, generally by informal means, that its clear policy was followed even by the recalcitrant:

> "[T]he F.C.C. fought valiantly for the right of legitimate minority groups to have time on other people's stations. As we have seen, the Commission took up the cudgels for the cooperative movement and organized labor in the early forties to

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[21] 10 F.C.C. at 518.

[22] *Broadcasting* magazine reported: "The FCC June 26 stated its flat opinion that radio time should be sold for the discussion of controversial public issues." Richards, *FCC Upsets NAB Code on Controversies*, BROADCASTING, July 2, 1945, p.15.

[23] See *NAB Revises Code, Expands Labor Relations*, BROADCASTING, Aug 13, 1945, p.20.

> amend its code to permit these groups to be heard. During 1945 and 1946, the F.C.C. gave sympathetic ear to complaints by the Steelworkers against WGY (Schenectady), by the United Electrical Workers against WICC and other Bridgeport stations, by the United Auto Workers against WGBV and other Indiana stations and against WBCM (Bay City, Michigan), and by the Cincinnati Industrial Council against WKRC (Cincinnati). Most of them were followed up and quietly settled 'out of court.' "[24]

Some cases went to formal ruling, however. In them the Commission made clear that the "public interest" mandate of the statute, while allowing reasonable discretion, not only prevented absolute refusals to sell time for political discussion, but also prevented total bans on sale of time for such public issues as abstinence, or such important topics as religion. In *Robert Harold Scott,* 11 F.C.C. 372 (1946), when a broadcast licensee

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[24] L. WHITE, *supra* n.18, at 175. The Solicitor General and Commission dismiss the *United Broadcasting* case as "dicta," apparently because the licensee rather than lose its license acquiesced in the policy which the Commission said was required. See Brief for the United States and the Federal Communications Commission at 47. The Brief for Post-Newsweek Stations, Capital Area, Inc. in No. 71-865, calls *United Broadcasting Co.* "an eccentric departure from an otherwise uniform line of Commission pronouncements." *Id.* at 37 n.36. Of the three recent Commission rulings the brief cites, *Democratic State Central Committee,* 19 F.C.C. 2d 833 (1968), involved free time under the fairness doctrine. *Mrs. Madalyn Murray,* 40 F.C.C. 647 (1965), was a request under the fairness doctrine for time at preferential rates to discuss religion. In any event, neither involved an asserted *total ban* on sale of time for controversial issues. The unreported letter to Washington Women's Strike for Peace, see App. 366, was again a complaint about failure to provide time to one particular group. The briefs for intervenors CBS and ABC do not refer to the *United Broadcasting, Albuquerque Broadcasting, Scott, Rainey, or Morris* cases (see *infra*) at all.

had refused to sell time at the going rate for a talk on religion, the Commission said the "public interest" requirements of the Act would not permit an absolute ban on sale for such discussion:

> "Freedom of speech can be as effectively denied by denying access to the public means of making expression effective — whether public streets, parks, meeting halls, or the radio—as by legal restraints or punishment of the speaker.
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> * * *
>
> "The criterion of the public interest in the field of broadcasting clearly precludes a policy of making radio wholly unavailable as a medium for the expression of any view which falls within the scope of the constitutional guarantee of free speech."[25]

See also *Homer P. Rainey,* 11 F.C.C. 898 (1947), in which the Commission, relying on *United Broadcasting Co., supra,* disapproved a licensee's policy of refusing to sell substantial amounts of time to political candidates:

> "Obviously, it would not be in the public interest for the licensee of any radio station . . . to arbitrarily deny or restrict the right of any person or group to discuss a public controversial issue . . . ." 11 F.C.C. at 903 (1947).

Cf. Sam Morris, 11 F.C.C. 197 (1946) (noting, on complaint that licensee had refused to sell time for "abstinence broadcasts," that beer and wine commercials raised an issue of public importance").[26]

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[25] 11 F.C.C. at 373, 376.

[26] When a licensee complained of administrative problems in selling time for paid broadcasts on controversial issues, the Commission reiterated:

> "[T]he possibility of the occurrence of such difficulties does not justify a station licensee in adopting a general rule that it

When in 1949 the Commission undertook a review of its policies in the "fairness" area, with particular emphasis on editorials by licensees, it reaffirmed its adherence to its earlier decisions, and said that "the inevitability that there must be some choosing between various claimants for access to a licensee's microphone, does not mean that the licensee is free to utilize his facilities as he sees fit or in his own particular interests as contrasted with the interests of the general public."[27] When the issue arose thereafter, the important role of purchased as well as of free time to discuss public issues was recognized.[28]

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will not make time available for the discussion of controversial subjects or for broadcasts by duly qualified candidates for public office. . . . Such refusal is inconsistent with the concepts of public interest established by the Communications Act as the criterion of radio regulation." *Albuquerque Broadcasting Co.*, 3 P. & F. RADIO REG. 1820, 1821 (1946).

[27] *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1248 (1949). There is no basis for the Commission's assertion, at p. 47 of its brief, that the *United Broadcasting Co.* decision was somehow without explanation swallowed up or overruled *sub silentio* by the 1949 Editioralizing report's reiteration of the general fairness doctrine and the licensee's duty to provide coverage of public issues. The 1949 report in this respect was a restatement, focused on licensee editorializing, of the principles in the Commission's famous "Blue Book," *Public Service Responsibilities of Broadcast Licensees* (1946), issued a few months after the *United Broadcasting Co.* decision. That 1946 issuance contained, like the 1949 reiteration, a statement that "the public interest clearly requires that an adequate amount of time be made available for the discussion of public issues." *Id.* at 40. There was no suggestion that requirement absolved licensees from the separate, but complementary, requirement in *United Broadcasting*, *Scott*, and other cases that time not be totally withheld from all those who wished *to purchase* it to discuss issues. The fact that *Scott*, *Morris*, and *Albuquerque Broadcasting* were decided after the Blue Book confirms this.

[28] See *City of Jacksonville*, 21 F.C.C. 334, 342 408 (1956); *cf. Loyola University*, 12 P. & F. RADIO REG. 1017, 1099 (1956).

So clear was the understanding that licensees could not totally ban speech on controversial issues that this "public interest" requirement was interpreted by the broadcast industry as overriding even the explicit reservation in § 315 of the Act that time need not be sold to candidates for public office.[29] The understanding was summarized by the President of the National Association of Radio and Television Broadcasters:

> "So now you must, as a matter of public interest—though there is not a statute that says you must take political advertising—the Commission has made it very clear that if you do not assume your public responsibility, competitively you may fail to get a license, or you may lose your license.
>
> . . . It is not fully true that you can reject all political advertising and still perform your public-service duty.[30]

This Court likewise recognized the force of the "public interest" requirement in *Farmers Educational & Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959), noting that "the Commission considers the carrying

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[29] *Cf. Red Lion, supra,* 395 U.S. at 382-83.

[30] *Hearings on Proposed Amendments to the Federal Corrupt Pracices Act and Hatch Political Activities Act Before the Senate Subcommittee on Privileges and Elections, Committee on Rules and Administration,* 82d Cong., 1st & 2d Sess. 176 (1951-2). Counsel for the broadcasters agreed. See Peterson, *Political Broadcasts,* 9 J. FED. COMM. BAR ASSN. 20, 21-22 (1948). *Accord, Hearings on Miscellaneous Bills to Amend the Communications Act of 1934, Before a Subcommittee of the House Committee on Interstate and Foreign Commerce,* 84th Cong., 2d Sess. 297-8 (1956). See also NATIONAL ASSOCIATION OF RADIO AND TELEVISION BROADCASTERS, THE TELEVISION CODE 4 (1952) which instead of a flat ban on sale of time for discussion of "Controversial Public Issues" stated that requests to discuss such issues "should be considered on their individual merits."

of political broadcasts a public service criterion to be considered both in license renewal proceedings, and in comparative contests for a radio or television construction permit.'"[31]

Thus a flat ban on sale of time for political discussion, or for other issues of public importance, has on many occasions been held a violation of the statutory requirement that broadcast licensees operate in the public interest. In following the precept that statutes are to be construed if possible to avoid constitutional questions, this Court has not hesitated to interpret broad and open-ended statutory mandates to that end. *Cf., e.g., Steele* v. *Louisville & N.R.R.*, 323 U.S 192 (1944) (duty to avoid racial discrimination inferred from duty of representation in Railway Labor

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[31] *Id.* at 534 (footnote omitted). The dissenting Justices in *WDAY* agreed that, 'The Federal Communications Commission has determined that to fulfill this congressional command ["public convenience, interest or necessity" in § 307] stations must carry some political broadcasts." 360 U.S. at 544 (dissenting opinion). *Accord, Obligation of Licensee To Carry Political Broadcasts*, 25 P. & F. RADIO REG. 1731, 1735 (1963). See also *John P. Crommelin*, 19 P. & F. RADIO REG. 1393 (1960), stating that the statute was not violated by a refusal to sell time to candidates for one public office because of lack of interest by the public, when time was sold to candidates for other offices.

In 1959, with this history before it, Congress amended § 315 of the Act to eliminate the equal-time rule for bona fide news broadcasts. The amendment was not intended to "diminish or affect in any way the Federal Communications Commission policy." S. REP. No. 562, 86th Cong., 1st Sess 13 (1959). See also H.R. REP. No. 1069, 86th Cong., 1st Sess. 5 (1959). The long-standing recognition that the public interest requirement superseded even the express language of § 315(a) respecting candidates was codified in the 1972 legislation which specifically stated that licensees may not adopt a policy of refusing to sell time to political candidates. See P.L. 92-225, 86 Stat. 3, § 103(a)(2) (1972).

Act); *Mitchell* v. *United States,* 313 U.S. 80 (1941) (racial segregation by railroad held to violate Interstate Commerce Act's prohibition of "undue or unreasonable prejudice or disadvantage"). The holdings of the Commission from the first decade of interpreting the "public interest" mandate of the Act are entitled to respect, particularly when this original reading of Congress' intent enhances the exercise of rights protected by the First Amendment. For the "public interest standard of the Act necessarily implies reference to the First Amendment's goals."[32] The Commission's attempt in the present case to overturn its previously established rule can only serve as an example of regulatory inconstancy which, when the right of free speech is thereby jeopardized, this Court cannot tolerate.[33]

B. The Communications Act Forbids Interference With the Right of Free Speech.

The Commission's previously established interpretation of the "public interest" requirement is buttressed by section 326 of the Communications Act, which forbids the Federal Communications Commission to "promulgate or fix" any "regulation or condition . . . which shall interfere with the right of free speech by means of radio communication."[34] The origins and history of § 326 show that it was a statutory commitment to a system of broadcasting consistent

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[32] *Red Lion, supra* 395 U.S. at 390. The broad objectives of the Act were recently reiterated in *United States* v. *Midwest Video Corp.,* 406 U.S. 649 (1972); see also *United States* v. *Southwestern Cable Co.,* 392 U.S. 157 (1968).

[33] *Cf.* Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards,* 75 HARV. L. REV. 863 (1962).

[34] 47 U.S.C. § 326.

with the First Amendment, one free from censorship of ideas because they are controversial.

The Communications Act of 1934 had its beginning in the Radio Act of 1927,[35] and with respect to radio broadcasting policy was "largely a rewriting" of the earlier law.[36] Secretary of Commerce Herbert Hoover, whose Department had attempted to regulate broadcasting before the Radio Act, had testified:

> "We can not allow any single person or group to place themselves in position where they can censor the material which shall be broadcasted to the public, nor do I believe that the Government should ever be placed in the position of censoring this material." [37]

His warning was in the minds of the members of Congress who wrote the Radio Act.[38]

The issue of broadcast licensees attempting to bar certain views from access to the air was raised by Representative Davis, who believed the House bill was not explicit enough on the subject:

> "A question was asked by the gentleman from New York [Mr. LaGuardia] about censorship, whether there was anything in this bill permitting Government censorship.

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[35] 44 Stat. 1162, ch. 169.

[36] *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940).

[37] *Hearings on H.R. 7357 Before the Committee on the Merchant Marine and Fisheries, House of Representatives*, 68th Cong., 2d Sess. 8 (1924).

[38] See, *e.g.*, 68 CONG. REC. 2571 (1927); 67 *id.* 5484 (1926).

> "The answer was no; and I am not in favor of that, but I am even more opposed to private censorship over what American citizens may broadcast to other American citizens. [Applause.]" [39]

However, the broadcasters had argued that they needed to protect themselves by screening statements in advance for possibly defamatory material for which they might be held liable, material not itself protected by the First Amendment.[40] Congressman Davis was reassured that such limited review was to be the only kind of private censorship permitted to broadcasters:

> "The only thing they do, as I understand it, is to see to it that nothing that is slanderous or seditious is put out over the radio .... [A]ll they did with any manuscript that came in was simply to edit it, and if it was such an article that could properly appear in a newspaper, they broadcast it, and if it was not an article that would be proper to put in a newspaper, they did not broadcast it .... [T]hey simply want to edit the manuscript to see it is not slanderous or seditious." [41]

With that understanding, Section 29 of the Radio Act was enacted.

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[39] 67 CONG. REC. 5484 (1926).

[40] *Cf. Sorensen* v. *Wood*, 123 Neb. 348, 243 N.W. 82 (1932), *appeal dismissed sub nom. KFAB Broadcasting Co.* v. *Sorensen*, 290 U.S. 599 (1933), discussed in *Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525, 528 n.2 (1959).

[41] 67 CONG. REC. at 5491 (remarks of Mr. Free). Such appears to be in essence the sort of limited review applied by broadcast licensees to announcements today, if the announcements are commercial. See *Center for Law and Social Policy*, 23 P. & F. RADIO REG. 2d 187, 188 (1971), quoted in Brief for the United States and the Federal Communications Commission 51 n.44.

In 1934 when the Communications Act was passed the members of Congress again emphasized their intention to preserve the public's right of free speech. Representative Rayburn, manager in the House, reported that § 29 had been carried forward in § 326 of the new act.[42] When a Representative complained that a Senator had not been allowed to speak on the radio, he was assured that, while subject to the licensees' right to remove slanderous materials,

> "Section 29 is really the Magna Carta of the whole procedure and covers generally the complaints that have been made here today with regard to the freedom of the air."[43]

The Commission has also recognized that the free speech provision of § 326 expresses an *affirmative* policy that the people not be totally denied access to their airwaves whether by the Government, or by the Government's licensees:

> "Section 326 of the act provides that this control of the United States shall not result in any impairment of the right of free speech by means of such radio communications. It would be inconsistent with these express provisions of the act to assert that, while it is the purpose of the act to maintain the control of the United States over radio channels, but free from any regulation or condition which interferes with the right of free speech, nevertheless persons who are granted limited rights to be licensees of radio stations . . . may themselves make radio unavailable as a medium of free speech."[44]

In *Linn* v. *United Plant Guard Workers,* 383 U.S. 53 (1966), this Court held that the National Labor Rela-

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[42] 78 CONG REC. 10313, 10988 (1934).

[43] 78 CONG. REC. 1032 (1934) (remarks of Mr. McGugin); see also *id.* at 10329 (remarks of Mr. Culkin).

[44] *Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 1248 (1949).

tions Act must be interpreted as incorporating the standards of the First Amendment. See 383 U.S. at 65. Such a construction is all the more appropriate where, as here, the Congress, in the basic federal statute dealing with communications, has explicitly referred to the Constitution by adopting constitutional language—"the right of free speech"—as the statutory standard.[45] And when the question is one not of telephone rates or channel interferences, but rather of free speech, no administrative body has more expertise than this Court.[46]

C. Congress Had No Intention, in Excluding Broadcast Licensees from the Traditional Category of Common Carriers for Hire, To Exempt the System of Broadcasting Regulation from Public Interest and Free Speech Requirements.

Petitioners argue that public interest and free speech considerations are irrelevant because Congress in the definitional section of the Communications Act did not classify broadcast licensees as "common carriers." See 47 U.S.C. § 153(h). But the DNC is not arguing, and the court below specifically did not hold, that licensees are "common carriers."[47] To refrain from totally refusing to sell *any* time for discussion of public issues does not make one a "common carrier." And when that phrase is placed in the context of the Communications Act as drafted, it is seen that Congress did not regard it as detracting from the statutorily imposed responsibilities of broadcast licensees.

The phrase "common carrier" appears in the Interstate Commerce Act,[48] which as amended prior to 1927 vested in the Interstate Commerce Commission juris-

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[45] See 67 CONG. REC. 5480 (1226) (remarks of Mr. White); *Red Lion, supra*, 395 U.S. at 389-90.

[46] *See New York Times Co*, v. *Sullivan, supra*, 376 U.S. at 285; *Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946).

[47] See App. 482.

[48] 49 U.S.C. § 1 *et seq.*

diction to regulate the charges of companies engaged in wire or radio communication. The phrase was included in early drafts of the bill which became the Radio Act of 1927 for at least two reasons. First, some Senators apparently were under the impression that the commerce power of Congress extended only to regulation of common carriers, or that the phrase common carrier signified operation in interstate commerce.[49] Secondly, the term recognized the intention of some that certain aspects of radio broadcasting should remain subject to the jurisdiction of the Interstate Commerce Commission even after licensing responsibilities were assigned to the Federal Radio Commission.[50]

However, drawbacks to the "common carrier" language as theretofore applied to railroads, telephones, and telegraph companies became apparent. Clearly the doctrines associated with transportation companies or those engaged in point-to-point transmission of messages would not perfectly fit licensees whose principal function was to disseminate broadcasts of entertainment and information. It was also feared that use of the phrase "common carrier" might turn all or nearly all the broadcast day over to commercial advertisers or senders of personal messages, making scheduled programs impossible and leaving little or nothing for the public.[51]

> "If they are made common carriers, one wishing to advertise goods, automobiles or any other commodity, would have to be served, and the radio

[49] See 67 CONG. REC. 12502 (1926) (remarks of Senator Watson).

[50] See 68 CONG. REC. 2580 (1927) (remarks of Mr. White); see also *id.* 3032 (remarks of Senator Dill).

[51] See 67 CONG REC. 12356 (1926) (remarks of Senator Fess).

> would be deprived of the incentive which it now has of getting a certain program which the broadcasting stations must prepare in advance, in order to give a regulate entertainment at regular hours, to comply with the hours in which their licenses specify they may entertain." [52]

Senator Dill agreed that even with respect to discussion of "public questions" a common carrier provision would be unwise, since "they would have to give *all* their time to that kind of discussion." [53] The concern was over *total* loss of control over program schedules—not over the recognized public interest responsibility to provide *some* time for discussion of public issues, and certainly not over any time already set aside for advertising. It was such concerns that led to the 1934 Act's differentiating the telephone and telegraph companies regulated under Title II of the Act from the different system of regulation established under Title III for commercial broadcasting.[54]

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[52] 67 CONG. REC. 12504 (1926) (remarks of Senator Broussard).

[53] *Ibid.* (emphasis supplied).

[54] The draftsmen of the Communications Act would have been surprised at the assertion that by not making broadcasters "common carriers" forced to accept all commercial advertisements, they were thereby enacting a regime which barred the airwaves to paid discussion of public issues and left them entirely to commercial product advertisements. Congressman Fess stated:

> "I am disgusted, as I know a great portion of our people are disgusted, with the pollution of the air for mere commercial purposes." 78 CONG. REC. 8832 (1934).

Congressman White added:

> "I have long been a believer, and I believe now, that commercial activities occupy too much of the time and use too many of the radio facilities of this country." *Id.* at 8845.

In short, what Congress said is that a broadcast licensee is not a telephone company. It is not to be regulated "in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission." *FCC* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 474 (1940). The concern of Congress in eliminating the term "common carrier" was not to undermine the clearly expressed statutory duty of broadcast licensees to serve the public interest. It was not to give licensees the right to engage in arbitrary conduct. It was simply to prevent total control by advertisers and avoid importing to a new medium terminology which did not suit the intended method by which it was to serve the public. As the late Professor Chafee noted:

> "The context plainly shows this [§ 153(h)] to mean a 'common carrier for hire,' like a telegraph company. It has no reference to what we are now talking about—the obligation to present all sides fairly."[55]

II. THE COMMISSION'S APPROVAL OF AN ARBITRARY AND ABSOLUTE BAN ON PURCHASE BY A NATIONAL POLITICAL PARTY OF RADIO AND TELEVISION TIME TO DISCUSS PUBLIC ISSUES VIOLATES THE FIRST AND FIFTH AMENDMENTS.

In its present posture, the only issue in this case is the Commission's ruling that a total and absolute ban on political parties' buying time at full commercial rates to discuss political matters is consistent with the Communications Act and the First Amendment. The Court of Appeals held that an absolute ban could not stand, and directed the Commission to fashion rules granting some right of some persons to purchase some time in some circumstances. It left the Commission

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[55] 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 635 n.75 (1947).

and licensees "broad latitude to develop 'reasonable regulations' " with "room for broad exercise of the broadcasters' discretion." [56]

The petitioners challenge that direction. They make an extreme "broadside attack" on any right of a party to purchase any time. The standards for purchase which might be applied are "not challenged and not before us." *Cf. Times Film Corp.* v. *City of Chicago,* 365 U.S. 43, 50 (1961). Petitioners frame their claim in sweeping and absolute terms.[57] By doing so, they leave this Court little latitude. To the absolute arbitrary power for which the licensees contend, the answer clearly must be, no. *Cf. Times Film, supra.*

A. An Arbitrary and Absolute Ban on Use by a Political Party of the Twentieth Century's Most Effective Public Forum Cannot Stand If Debate on Public Issues Is To Be "Uninhibited, Robust, and Wide-open."

In *Abrams* v. *United States,* 250 U.S. 616 (1919), Mr. Justice Holmes in dissent sounded what has become a dominant theme in applying the First Amendment to the changing problems of the Nation that come before this Court. "[T]he ultimate good desired," he said, "is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get

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[56] App. 484.

[57] The Court below stated that

> "The Commission's and intervenors' argument might be somewhat stronger if it were designed to support a partial ban on editorial advertising concerning issues and views which have *in fact* been substantially aired on normal programming time. The argument is unconvincing, however, in support of a flat, *per se* ban on any and all editorial advertisements." App. 471, 482 (emphasis in original; footnote omitted.)

itself accepted in the competition of the market." 250 U.S. at 630.[58] In *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), this Court spoke of this Nation's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," and in *Pickering* v. *Board of Education*, 391 U.S. 563, 573 (1968), referred to this as "the core value of the Free Speech Clause of the First Amendment."[59] With respect to radio and television broadcasting in particular, this Court has held that "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to contenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).[60]

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[58] Similarly, Judge Learned Hand noted the Nation's vital interest in

> "the dissemination of news from many different sources with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."

United States v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945). See also Radcliffe, *Censors*, SELECTED ESSAYS ON CONSTITUTIONAL LAW 1938-1962, 685, 697 (Barrett et al. ed. 1963); "We must stake our future upon fecundity of ideas."

[59] *Cf. Whitney* v. *California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

[60] See also, *e.g.*, *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966); *Thornhill* v. *Alabama* 310 U.S. 88, 102 (1940); see generally Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REVIEW 191.

Yet the Commission in this case argues for a different scheme. Under it, broadcast licensees alone are to determine what public issues the public should be exposed to, and how discussion should be structured. As CBS benignly puts it, there must be "intervention of professional journalists between the event and the public." [61] The situation was described with less euphemism by Lord Radcliffe, a gentleman not lacking in experience with censorship and the media, who listed "the controllers of radio and television" among "the real licensors of thought today":

> "We create great systems for the production and dissemination of ideas and concentrate in the control of them a power that by inertia can easily defeat the very liberties that are in form beyond attack. It is in this power that there lies a modern and effective censorship; it intervenes between the public and those who would communicate with it, and by its tone, by its assessment of comparative values, and by its courage or its fearfulness about men and affairs it can profoundly influence ideas and aspirations." [62]

The networks' paternalistic scheme for organizing public discussion overlooks two vital aspects of the First Amendment's rather different plan for discussion of public issues: First, that a rule is not to be tolerated which "dampens the vigor and limits the variety of public debate," *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 279, and that even if one-sided, "utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth," *Garrison* v. *Louisiana,* 379 U.S. 64, 73 (1964). Secondly, that where the public's resources—streets, parks, or airwaves—are

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[61] App. 57.

[62] Radcliffe, *supra* n. 58, at 685, 686, 698.

used for discussion, they may not be arbitrarily and totally denied to responsible speakers by those who administer the resource.

1. The Public's First Amendment Right To Be Informed Includes the Right of Direct Communication With the Proponents of Ideas.

In *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969), this Court unanimously, over the networks' strenuous objections to the Commission's fairness doctrine, reiterated that the First Amendment protects "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences." "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." 395 U.S. at 390.

There was nothing new or remarkable in this holding that the First Amendment, besides including the right to distribute information, "necessarily protects the right to receive it." *Martin* v. *City of Struthers,* 319 U.S. 141, 143 (1943). This Court has protected the public's First Amendment right to be informed on many occasions, in a variety of contexts.[63] The Commission and its licensees all appear to concede the point.

Yet the broadcast licensees seek to vitiate their concession by arguing here, as they did unsuccessfully in *Red Lion,* that they can do a better job of presenting ideas than can the proponents of those views, and can by their "intervention" between speaker and listener achieve more "objectivity and fairness" (App. 51). The short answer to that condescending attitude was

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[63] See, *e.g., Stanley* v. *Georgia,* 394 U.S. 556, 567 (1969); *Time, Inc.* v. *Hill,* 385 U.S. 374, 388 (1967); *Griswold* v. *Connecticut,* 381 U.S. 479, 482 (1965); *Lamont* v. *Postmaster General,* 381 U.S. 301, 307 (1965); *id.* at 308 (Brennan, J., concurring).

provided by this Court in *Red Lion*, quoting John Stuart Mill:

> "Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them." [64]

If a public park were often used for meetings, it would seem bizarre to reject citizens' requests to schedule a peaceful speech on it by saying, "No, you may not give your speeches, but instead someone else may give them for you." Nor would it help to add, "Perhaps some of you may, if we choose, be allowed to say a few words, under conditions that we choose." That does not have the ring of the First Amendment. Yet that is where the licensees' logic ultimately leads.

The licensees make the facile assertion that if anything is worth saying to the American people, the licensees see that it gets said, and as fully as it deserves, on the air.[65] One wonders that human beings are capable

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[64] 395 U.S. at 392 n.18, quoting J. MILL, ON LIBERTY 32 (R. McCallum ed. 1947). The same assumptions, of course, underlie the adversary procedures of the Anglo-American judicial system. See, *e.g.*, E. CHEATHAM, A LAWYER WHEN NEEDED 4-5 (1963).

[65] The networks' assertions seem to vacillate as to whether they claim total discretion only to select all spokesmen and formats, or to decide which issues the public shall hear as well. *Cf.* NBC's reference to the "right to determine in the first instance which issues and which points of view should be broadcast." Brief of Amicus Curiae at 15. The confusion is not surprising; obviously such a line is almost impossible to draw.

of such omniscience and industry.[66] But in fact, although the licensees' obligation to serve the public interest requires them to give some coverage of public issues,[67] few observers are under any illusions that this rather vague requirement alone guarantees "robust" debate:

> "[T]here is considerable possibility that the broadcaster will exercise a large amount of self-censorship and try to avoid as much controversy as he safely can . . . . It seems doubtful . . . that except in cases of glaring failure to discuss paramount issues, the Commission could detect editorial cau-

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[66] CBS in order "to demonstrate how fully and fairly issues are reported to the public by CBS News" attached a minute-and-second compendium of its principal evening news program's coverage of two major issues, the Indochina War and domestic reaction and protest, for March, April, and May, 1970. See App. 53. These figures show that during that period of intense war-related activity, CBS devoted to overall coverage of the war, Congressional and official reaction, and domestic protest, diplomatic negotiations, and the My Lai massacre, a combined total of 3 minutes and 55 seconds each evening in March 1970, and 4 minutes and 59 seconds in April 1970. (App. 82-108). In May, the month that saw the Cambodian incursion, the Kent State tragedy, and widespread campus riots, the combined average rose to 8 minutes and 6 seconds, the longest single item being a 10½ minute reply by CBS to charges that it had falsified a story. (App. 109-128, 123.) In addition, CBS stated that commentator Eric Sevareid gave views averaging about 2½ minutes in length on matters in some way related to Indochina on 16 of the 92 days in question, once "on two foreign crisis areas . . . with emphasis on Trinidad." (App. 129-30.) CBS in the same period broadcast two Presidential addresses, to which it appended 11:16 and 18:24 minutes respectively of analysis by CBS reporters (App. 131, 133-136), and three news specials, two of them on college riots (App. 139-149); Mike Wallace interviewed Walter Hickel (20:30), John Mitchell (1:00), and Seymour Hersh (12:18) (App. 160); and guests on "Face the Nation" over the fourteen-Sunday period addressed all these subjects for an average of 10 minutes and 10 seconds per broadcast (App. 165-169).

[67] See *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598 (1964).

> tion. The rather unrealistic assumption that the Commission can deal successfully with editorial caution is . . . evidence of wishful thinking." [68]

Nor is it simply a question of giving adequate coverage to what is newsworthy. At stake is the ability to bring new or unperceived issues to the attention of the American people, without having to resort to sit-ins, street demonstrations, or other disruptive or violent activities which may be more likely to draw television coverage.

This Court has recognized the importance in our communications system of editorial advertisements, calling them "an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of the press even though they are not members of the press." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266 (1964). And as the court below recognized:

> "'Viewpoints' cannot be so neatly and infallibly catalogued as the Commission would have us believe. Self-expression and public debate are much more subtle phenomena; matters of style and intensity of feeling are important components." [69]

Accord, Lee v. *Board of Regents*, 306 F. Supp. 1097, 1101 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969).

There is also the simple matter of accuracy. Even if one could accept the paternalistic theory of the net-

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[68] Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 773-4 n.26 (1972).

[69] App. 472 (footnote omitted).

works, experience has shown time and again that they are not always dependable parents, and that it is safer for people who believe ideas to express them in their own way than to rely on the "intervention . . . of professional journalists." For example, in *Complaint Concerning the CBS Program "The Selling of the Pentagon,"* 30 F.C.C.2d 150 (1970), whatever one's opinions on the underlying subject matter, the Commission unanimously found that the licensees had shown views which might have appeared decidedly differently without their "intervention":[70]

> "As far as the viewer could tell—and neither Colonel MacNeil nor CBS made it clear—the

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[70] "This is what the viewers of the CBS documentary were shown as a single exchange:

> ROGER MUDD: What about your public displays of military equipment at state fairs and shopping centers? What purpose does that serve?
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> MR. HENKIN: Well, I think it serves the purpose of informing the public about their armed forces. I believe the American public has the right to request information about the armed forces, to have speakers come before them, to ask questions, and to understand the need for our armed forces, why we ask for the funds that we do ask for, how we spend these funds, what we are doing about such problems as drugs—and we do have a drug problem in the armed forces, what we are doing about the racial problem—and we do have a racial problem. I think the public has a valid right to ask us these questions.

"This, on the other hand, is how Mr. Henkin actually answered the question cited above:

> MR. HENKIN: Well, I think it serves the purpose of informing the public about their armed forces. [*This is the only sentence that was retained intact in the answer as broadcast.*] It also has the ancillary benefit, I would hope, of stimulating interest in recruiting as we move or try to move to zero draft calls and increased reliance on volunteers for our armed forces. I think it is very important that the American youth have an opportunity to learn

speaker seemed to be affirming the 'domino theory' as applied to Southeast Asian nations under Communist pressure, although as the printed transcript shows he was in fact quoting the Prime Minister of Laos to this effect." 30 F.C.C.2d at 151.

"The other aspect of principal controversy concerns an interview between Mr. Henkin [Assistant Secretary of Defense] and Mr. Mudd [CBS reporter]. In it, some portions of Mr. Henkin's

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about the armed forces. [*Both the latter sentences were dropped entirely.*]

"The answer Mr. Henkin was shown to be giving had in fact been transposed from his answer to another and later question that dealt not only with military displays but also with the availability of military speakers. At that later point in the interview, Mr. Mudd asked Mr. Henkin whether such things as drug and racial problems constituted 'the sort of information that gets passed out at state fairs by sergeants who are standing next to rockets.'

"Mr. Henkin replied as follows:

MR. HENKIN: No, I didn't—wouldn't limit that to sergeants standing next to any kind of exhibits. I knew—I thought we were discussing speeches and all.

"But this is how the sequence was shown over the air:

MR. MUDD: Well, is that the sort of information about the drug problem you have and the racial problem you have and the budget problems you have—is that the sort of information that gets passed out at state fairs by sergeants who are standing next to rockets?

MR. HENKIN: No. I wouldn't limit that to sergeants standing next to any kind of exhibits. Now, there are those who contend that this is propaganda. I do not agree with this.

"The second sentence of Mr. Henkin's actual answer—the part about 'speeches and all'—had been omitted. And the 'new' material—about propaganda—came from an earlier point in the interview and was in fact a reference to charges that the Pentagon was using talk of an 'increasing Soviet threat' as propaganda to influence the size of the military budget."

30 F.C.C. at 151-52 (inserted comments and emphasis in original) (footnote omitted).

> answers were cut; and what appeared as answers to particular questions were in fact rearranged from answers to quite different questions. *Ibid.*'"[71]

The Commission, respecting the "journalistic functions" of "selection and editorial judgment" has refused "to lay down some precise line of factual accuracy." *Complaint Concerning the CBS Program "The Selling of the Pentagon," supra,* 30 F.C.C.2d at 152. The deference of the Commission to the licensees in this respect reflects the First Amendment's policy against censoring the statements and opinions which reach the public. But there is a complementary aspect of that policy: it assumes that error will be caught and corrected because there is to be a multitude of voices, "a marketplace of ideas in which the truth will ultimately prevail." *Red Lion, supra,* 395 U.S. at 390. Remission of the public to the marketplace of ideas necessarily presupposes that the market exists. There cannot be "monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion, supra,* 395 U.S. at 390. The very need to avoid governmental censorship of program content implies that other sources of information shall have some opportunity, at their own expense, to speak directly to the public on important matters as they see them.

The good faith of the broadcast licensees and their employees is not the question. The DNC does not challenge it. No doubt CBS, ABC, and NBC sincerely be-

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[71] See also *Complaints Covering CBS Program "Hunger in America,"* 20 F.C.C. 2d 143, 147 (1969) ("CBS nevertheless engaged in sloppy journalism or was recklessly indifferent to the truth in not ascertaining the cause of death of the Wright baby" —infant shown as dying of malnutrition who actually died of complications from prematurity); *Complaints Concerning Network Coverage of the Democratic National Convention,* 16 F.C.C. 2d 650 (1969).

lieve that they are the best judges of what the public should see and hear every minute of every day. What the DNC contends is that the unparalleled power for which the networks argue cannot safely be lodged with anyone:

> "[T]he prospect is the somewhat menacing one that the way will simply be barred to the adventurous and the heterodox. It will not be barred by censorship as historically understood, it will not be barred by law: if it is barred it will be barred by a general average opinion imputed to the public, very likely quite erroneously, by a number of respectable gentlemen who will neither know nor want to know better." [72]

Functionally, in a limited medium, censorship is censorship, whether administered by government or by a few licensees.

Apparently recognizing that a constitutional compulsion for permitting discussion exists, the broadcast licensees now argue that the fairness doctrine (which they previously said was unnecessary and unconstitutional) is the whole answer. It is not and never been thought to be.[73] It is not enough to rely on the broadcast licensees as Platonic Guardians to decide for every

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[72] Radcliffe, *supra* note 58, at 697.

[73]

> "Both the Supreme Court, this court, and the Commission itself have all recognized that the fairness doctrine is not an island whole unto itself. It is merely one aspect of the Commission's implementation of the requirement that broadcasting stations serve the public 'interest, convenience, and necessity' . . . [T]he Commission has upon occasion recognized that time, rather than information, is of the essence."

Retail Store Employees Union, Local 880 v. *FCC*, 436 F.2d 248, 257 (D.C. Cir. 1970) (directing F.C.C. to hold hearing before renewing license of broadcaster which had refused to sell time to union).

minute what issues shall reach the public, who shall present them, and how they shall be shown.[74] If "supervised and ordained discussion" is less than the First Amendment intends for schoolchildren, *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503, 513 (1969), then surely it also is less than is required for the viewing and listening public.

2. The First Amendment Forbids an Arbitrary and Total Barring of Paid Political Broadcasts from a Forum Which Belongs to the Public, Is Dedicated Purely To Communication, and Is Probably the Most Effective Medium for Influencing Public Opinion.

Approximately 95% of American homes—nearly 60 million households—contain at least one television set, and that set is turned on for an average of more than five and one-half hours each day. The average adult American spends more time watching television than in any activity except sleeping and working, and looks to it and radio as his major source of most news.[75] As a House report noted:

> ". . . the [television] medium—for whatever reason—has become the public's prime source of in-

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[74] Even if the licensees were competent to perform this task, doubts as to their performance would always be present, doubts which do not enhance public confidence and national stability. *Cf. Columbia Broadcasting System, Inc.*, 17 P. & F. RADIO REG. 2d 843 (1969) (insufficient evidence of staging of news events); for one author's view, see E. EFRON, THE NEWS TWISTERS (1971).

[75] *Hearings on H.R. 13721 Before the Subcommittee on Communications and Power, Committee on Interstate and Foreign Commerce, House of Representatives*, 91st Cong., 2d Sess., p.7 (1970) (statement of Dean Burch, Chairman, Federal Communications Commission). Recent surveys concluded that 67% of the populace prefers the electronic media to other sources of information. Roper Research Survey, quoted in G. WYCKOFF, THE IMAGE CANDIDATES 13-14 (1968). An estimated 59% depend on television as their principal source of news. See *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules*, 22 F.C.C.2d 339, 344 (1970).

> formation. It is this fact which determines its influence. In advancing to the stage of importance, broadcasting has in many ways supplanted the other media of mass communication." [76]

In the United States in the final third of the Twentieth Century, television is the political forum *par excellence.*

There is considerable evidence that the electorate is deeply influenced by telecasts on public issues. For example, many commentators have concluded that the televised debates between the 1960 Presidential candidates of the two major political parties—witnessed by more than 115 million Americans—were the decisive factor in that election.[77] According to the Harris poll, prior to President Nixon's television address on April 30, 1970, concerning the crossing into Cambodia, only 7% of the nation approved such action; following his address, more than 50% approved. Before President Johnson's speech on the Gulf of Tonkin incident, less than half of the electorate approved of his Vietnam

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[76] H.R. REP. No. 91-257, 91st Cong., 1st Sess. 6 (1969). ABC agrees as to:

> "the critical role the broadcast media play in keeping contemporary American society adequately informed on important public issues. That broadcasting in general and electronic journalism in particular have become major sources of information to the American public is, therefore, an undeniable threshold premise."

Brief for Petitioner American Broadcasting Companies, Inc. at 18.

See generally J. KLAPPER, THE EFFECTS OF MASS COMMUNICATION (1960).

[77] See, *e.g.*, T. WHITE, THE MAKING OF THE PRESIDENT 1960, 352-53 (1961); K. LANG & G. LANG, POLITICS AND TELEVISION 213 (1968).

policy; after the speech, more than 70% of the public endorsed his program.[78] Those whose own interests are at stake believe television and radio are important, and they act accordingly.[79] Courts have recognized "the infinite potential of television to influence American life."[80]

The broadcasting spectrum is a public resource, publicly developed. Where a publicly owned resource is a reasonably appropriate forum for communications, a total ban on use of that resource for communication of ideas violates the First Amendment. *See, e.g., Grayned* v. *City of Rockford*, 40 U.S.L. WEEK 4881, 4884 (U.S. June 26, 1972), quoting *Hague* v. *CIO*, 307 U.S. 496, 515 (1939) (opinion announcing judgment).[81] In a case involving public property used primarily for

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[78] L. Harris, *President's Using TV Helps*, CHICAGO TRIBUNE, Sept. 3, 1970.

[79] *Cf., e.g.*, J. MCGINNIS, THE SELLING OF THE PRESIDENT 1968 (1969). The United States Government, indeed, believed television and radio so effective that it spent $10.6 million for broadcasting U.S. Army recruiting advertising in one thirteen-week period in 1971. See *Army Enlists Ayer for Ad Blitz*, BROADCASTING, Feb. 22, 1971, p. 38. The Senate has added a rider to the FY 1973 Department of Defense Procurement Authorization bill specifically authorizing purchase of radio and television time. See 118 CONG. REC. S11605 (daily ed. July 24, 1972).

[80] *Office of Communication of United Church of Christ* v. *FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969) (Burger, J.). "[T]echnology has immeasurably increased the powers of the press to do both good and evil . . . [The task is one of] implementing the First Amendment by assuring the effective communication which is essential to the continued functioning of our free society." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 60 (1971) (opinion of White, J.).

[81] See also *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 152 (1969); *Kunz* v. *New York*, 340 U.S. 290, 293 (1951); *Cf.* L. MUMFORD, THE CITY IN HISTORY 148-150 (1961) (Athenian agora);

purposes other than communication—streets, parks, and sidewalks—the task is to weigh the interest of citizens in using it for that purpose under reasonable regulation, against possible interference with the property's principal use. *Compare Cox* v. *Louisiana,* 379 U.S. 536 (1965), *and Cox* v. *Louisiana,* 375 U.S. 559 (1965), *and Brown* v. *Louisiana,* 383 U.S. 131 (1966), *with Adderley* v. *Florida,* 385 U.S. 39 (1966.[82] In the present case, such a conflict does not exist. For unlike a street, used principally for travel, or a park, used principally for recreation, the standard broadcast frequencies are public domain used principally for communication with the public—indeed, by decision of Congress they have no other use.

Even where the property involved is not public, in certain circumstances the interest in communication on public issues may override the ordinary property rights of the owner, when no suitable alternative method of communication is available. As one writer put it, in some cases there may be "a First Amendment easement."[83]

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id. at 221-227 (Roman forum). Although it was once said that municipal property could be used for communication only at the sufferance of the state, *Davis* v. *Massachusetts,* 167 U.S. 43, 48 (1897), on reconsidering the requirements of the First Amendment that notion that speakers could be absolutely banned from public property suited for speaking was "directly rejected by this Court," *Jamison* v. *Texas,* 318 U.S. 413, 418 (1943).

[82] See also *Niemotko* v. *Maryland,* 340 U.S. 268, 276 (1951). The Court of Appeals recognized the need to resolve competing interests when it said that the right not to be totally barred from purchase of time on the public airwaves was "abridgeable"—*i.e.*, that it was not absolute, and was subject to reasonable regulation. See App. 467.

[83] Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana,* 1965 SUP. CT. REVIEW 1, 13. See, *e.g.*, *Marsh* v. *Alabama,* 326 U.S. 501 (1946); *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968).

Lloyd Corp. v. *Tanner,* 40 U.S.L. WEEK 4829 (U.S. June 22, 1972), shows that even if the airwaves were privately owned, a reasonable right of access for speech would be required. In *Lloyd* a group sought free use of a privately owned shopping center to distribute handbills on a subject unrelated to the property's use. A lower court ordered the shopping center owner to allow "*all* non-commercial handbilling which *anyone* desires to undertake within its private premises." [84] This Court listed as relevant whether such a use would have any "relation to any purpose for which [the privately owned property] . . . was built and being used; whether the property owner was performing functions "as a delegate of the State;" whether there were "adequate alternative avenues of communication;" and whether the constitutional provisions against taking of property without due process of law or without just compensation could be adequately accommodated.[85] This Court in *Lloyd* found that the function of the property was sales, that adequate alternative places of communication existed, and that the asserted right was inconsistent with the private property's legitimate function. Clearly, by that analysis, communication is to be permitted where, unlike *Lloyd,* no right to use it in *all* situations is asserted, and where the property is the public's; it is administered by the Government's licensee; it has no function other than communication; the DNC is willing to pay; and no private property rights are compromised.

This Court in *Lloyd* reiterated that

> "it has often been held that publicly owned streets, sidewalks and parks are so historically associated

[84] 40 U.S.L. WEEK at 4833 n.11 (emphasis supplied).

[85] *Id.* at 4833, 4835, 4834.

> with the exercise of First Amendment rights that access to them for purposes of exercising such rights cannot be denied absolutely." [86]

No park, street or sidewalk is more important to communication in 1972 than the two or three network television channels in each of our major cities, or the radio stations which speak to the commuter. In no park, street or sidewalk is the public's Congressionally recognized interest in communication greater. For the public's airwaves or a city's streets, "access to them for purposes of exercising such rights cannot be denied absolutely." *Lloyd Corp.* v. *Tanner, supra.*

3. The Unique Characteristics of Publicly-Licensed Broadcasting Imply Corresponding Unique Obligations.

This case does not involve any medium other than the licensed broadcast frequencies. Broadcasting has long been recognized as unique, with characteristics which set it apart from newspapers, magazines, billboards, handbills, and all the other communications media. As Professor Chafee put it, "the [First] Amendment necessarily works out differently for radio simply because radio *is* different." [87]

—Broadcasting is conducted by using a scarce public resource.[88] And unlike other public property, the

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[86] *Id.* at 4832.

[87] 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 638 (1947) (emphasis in original).

[88] See 47 U.S.C. § 301. Although some who advocate more security for licensees from renewal challenges seek to dismiss the public's dominion of the airwaves as an "irrelevance," see Jaffe, *We Need the Pastore Bill,* NEW REPUBLIC, Dec. 6, 1969, p. 15, there remains an inescapable public concern for the use of the broadcast frequencies which does not, and indeed should not, obtain in a medium which was not public in its beginning and continued existence.

broadcast channels are not simply owned. They were actually created by federal action, out of chaos and "cacaphony." *Red Lion, supra,* 395 U.S. at 376. They are not public property incidentally rented out. Their use unavoidably involves their entire reason for being: to serve public interest in communication:[89]

—Licensees enjoy what one sympathetic observer called "a spectacular subsidy."[90] They are given, free of charge, the exclusive use of a precious and limited public resource. Licensees occupy, as this Court noted in *Red Lion,* "a preferred position conferred by the Government."[91]

—Licensees must comply with extensive federal regulation covering all aspects of the service they provide the public, a regulation so pervasive that the Com-

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[89] Through a curious constitutional *tour de force,* the intervening networks apparently have concluded that although access for noncommercial messages may be constitutionally required for transportation and recreation property like busses and parks, it is not required for licensed broadcast channels. See Brief for Petitioner American Broadcasting Companies, Inc. at 24; Brief for Petitioner Columbia Broadcasting System, Inc. at 24. The Commission also seems to imply that because the obligations of broadcast licensees to promote free speech are greater, their obligations to provide time to speakers are less. Brief for United States and Federal Communications Commission at 48 n.41.

[90] Kalven, *Broadcasting, Public Policy and the First Amendment,* 10 J. LAW & ECON. 15, 31 (1967). The characterization was contained in a memorandum prepared for CBS. The limited mailing rate subsidies enjoyed by printed periodicals until recently reduced did not approach in value or pervasiveness the benefits conferred on broadcast licensees; nor has the press ever been subject to the special and detailed regulation which for broadcast licensees is unavoidable. See *National Broadcasting Co.* v. *United States, supra.*

[91] 395 U.S. at 400. Returns on tangible investment for broadcast licensees in excess of 100% annually are not uncommon. See F. FRIENDLY, DUE TO CIRCUMSTANCES BEYOND OUR CONTROL 275-76 (1967).

mission has concluded that constitutional restrictions may have to be applied even to licensees' employment practices.[92]

—Because the number of frequencies is limited, broadcasting is "a medium not open to all" to exploit for profit.[93]

From these long-recognized distinctive features—public resource, preferred treatment, close governmental regulation, and physically limited number of frequencies—this Court has reasoned that broadcasting is constitutionally "a unique medium."[94] "Differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[95]

Beyond these, broadcasting as it has in fact developed shows other peculiarities which influence its role in public debate:

—Unlike printed media, the broadcast licensee's economic interest lies in minimizing, rather than increasing, coverage of ideas which are not of lowest-common-denominator mass appeal. A newspaper sells space, and the more features of interest to some group

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[92] See *Petition for Rulemaking To Require Broadcast Licensees To Show Nondiscrimination in Their Employment Practices*, 18 F.C.C.2d 240, 241 n.2 (1969); p. 74, *infra*.

[93] *Red Lion, supra*, 395 U.S. at 392. The statement that "unlike other modes of expression, radio is not available to all," *National Broadcasting Co.* v. *United States, supra*, 319 U.S. at 226, which the networks quote out of context, of course refers to the fact that broadcast *licenses* are limited in number, and broadcast licensees therefore are especially favored. The *NBC* opinion pointed this out by way of explaining the unique responsibilities which accordingly are imposed on licensees.

[94] *Red Lion, supra*, 395 U.S. at 390.

[95] *Id.* at 386 (footnote omitted); see also *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952).

it can add, the more copies it will sell. Television, however, sells time, and there is no way to add one feature without subtracting from time devoted to another. Each licensee seeks to maximize its audience at every moment. Hence the economic motivation of the networks is to avoid as much as possible showing anything that might not appeal to nearly every part of the audience.[96]

—Increasingly, as the court below recognized,[97] television and radio are the only truly mass media of communication in our society. Newspapers generally serve only a single metropolitan area. National magazines of general readership have found increasingly that a mass audience for them does not exist. Some, like *Colliers*, *Look*, and the *Saturday Evening Post* have gone out of business; others, like *Life*, have intentionally sought to reduce their circulation to reach a more specialized audience; others, like the *Saturday Review*, have attempted to split into several publications, each of more limited appeal. Increasingly the role of the printed press is localized or specialized. The closest one is able to come to assembling or speaking to the citizens of this country today, is to address them by television.

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[96] See generally F. FRIENDLY, *supra* n. 91, at 212-300. A CBS executive responsible for program decisions said frankly that his policy is to choose "not programs that he thinks people will necessarily *like*, or *benefit* from, or be enriched by, but programs he thinks people will watch." Thompson, *The Crapshoot for Half a Billion*, LIFE, Sept. 10, 1971, p. 47 (emphasis in original). See also Coase, *Evaluation of Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues*, 41 J. LAND AND P.U. ECON. 161 (1965); D. LACY, FREEDOM AND COMMUNICATIONS 69 (1961).

[97] App. 464.

B. The First and Fifth Amendments Forbid a Ban Which Discriminates Absolutely Against Paid Announcements on Political Subjects and in Favor of Commercial Advertisements.

One of the clearest rules of constitutional law is that when regulation of communication is permitted, the Constitution forbids a rule which favors one sort of speech over another. This Court reaffirmed that rule in two cases last Term, holding invalid under the Equal Protection Clause of the Fourteenth Amendment an ordinance which favored labor picketing over pickets on other subjects. *Police Dept.* v. *Mosley,* 40 U.S.L. Week 4877 (U.S. June 26, 1972); *Grayned* v. *City of Rockford,* 40 U.S.L. WEEK 4881 (U.S. June 26, 1972).[98] The same conclusion—that a public forum cannot be opened for one subject of discourse and closed to another—has also been reached in numerous decisions under the First Amendment.[99] In *Red Lion* itself, this Court noted that if that case had involved "a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves," then such a Commission policy "would raise more serious First Amendment issues." [100]

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[98] *Mosley* explicitly adopted the rule against speech discrimination stated in the concurring opinion in *Cox* v. *Louisiana,* 379 U.S. 536, 581 (1965). See 40 U.S.L. WEEK at 4879. This Court has recognized that the principles of the Equal Protection Clause are implicit in the Due Process Clause of the Fifth Amendment. *E.g., Bolling* v. *Sharpe,* 347 U.S. 497 (1954).

[99] See, *e.g., Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147 (1969); *Fowler* v. *Rhode Island,* 354 U.S. 67 (1953); *Niemotko* v. *Maryland,* 340 U.S. 268, 272-73 (1951). *Cf. Flower* v. *United States,* 407 U.S. 197 (1972).

[100] 395 U.S. at 396. See also *Lloyd Corp.* v. *Tanner, supra,* 40 U.S.L. WEEK at 4831.

In the present case, however, discrimination is conceded, as the Commission argues for the asserted right of its licensees to sell broadcast time freely for commercial advertising messages, but to ban it to political parties seeking to express views on matters of public concern, even though the political party asks no favors, and is willing to pay the going commercial rate. Heretofore this Court has indicated that speech on public issues is of greater constitutional concern than are product advertisements. Handbills containing ideas are constitutionally protected, when handbills with commercial messages are not. *Compare Schneider* v. *State,* 308 U.S. 147 (1939), *with Valentine* v. *Chrestensen,* 316 U.S. 52 (1942). Door-to-door solicitation for religious discussion is protected, when door-to-door solicitation selling magazine subscriptions is not. *Compare Martin* v. *City of Struthers,* 319 U.S. 141 (1943), *with Breard* v. *City of Alexandria,* 341 U.S. 622 (1951).[101] It does not disparage the commercial advertising system on radio and television to suggest that some fraction of the time for sale be sold for the type of discussion this Court has held of constitutionally greater significance.

What the networks seek is a constitutional inversion. The argue for an arbitrary and absolute policy barring political speech, while they sell all the time they reasonably can to virtually any hawker of commercial products. One would have assumed that if there were to be a constitutionally permitted discrimination between political and commercial speech on the licensed broadcast media, it would favor the political over the commercial. *Cf. New York Times Co.* v. *Sullivan, supra,*

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[101] See also *Wirta* v. *Alameda-Contra Costa Transit Dist.*, 64 Cal. Rep. 430, 434 P.2d 982 (1967).

376 U.S. at 266. Yet the petitioners seek to stand the First Amendment on its head and give total access to the sellers of soap, brassieres, deodorants, and mouthwashes, but none to advocates of ideas.

C. The First Amendment Forbids a Ban Which, in Barring Whatever a Licensee Labels "Controversial," is Both Unconstitutionally Vague and Overbroad.

The standard which the broadcast licensees propose to use—"controversial issues" [102]—to determine whether they will refuse to sell time is almost ludicrous in its ambiguity. This Court on many occasions has invalidated restrictions on speech in which the censoring authorities cited standards less open-ended. The rule was stated in *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147 (1969):

> "[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.[103]

Nor can such a standard be applied in clear-cut fashion. For example, while BEM has been denied an opportunity to purchase time for announcements protesting United States participation in the war, hundreds of licensees sold millions of dollars worth of time to the United States Army to persuade young men to enlist in the infantry.[104] In the words of the Supreme Court of California, striking down a similar restriction:

> "A cigarette company is permitted to advertise the desirability of smoking its brand, but a cancer

[102] See, *e.g.,* App. 45, 50-51, 297.

[103] 394 U.S. at 150-151 (footnote omitted).

[104] *Cf. Green* v. *FCC,* 447 F.2d 323 (D.C. Cir. 1971) (attempt to obtain free time under fairness doctrine).

> society is not entitled to caution by advertisements that cigarette smoking is injurious to health. A theater may advertise a motion picture that portrays sex and violence, but the Legion of Decency has no right to post a message calling for clean films. A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes." [105]

In an era of consumerism, the "controversial" broadcast really can be nearly anything. Under the licensees' proposed policy, it is whatever the licensee wants it to be. Their asserted power to grant occasional exceptions simply intensifies the First Amendment violation.[106]

There is another flaw in the policy which the Commission endorsed: the total ban, instead of regulating expression in limited fashion to accommodate other essential social purposes, sweeps out in wholesale fashion any efforts to purchase time to communicate with the American public on radio and television. On many occasions this Court has held that restrictions on speech must be supported by a compelling interest, and must be narrowly drawn. Where restrictions are tolerated, the least restrictive means of accommodating speech

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[105] *Wirta* v. *Alameda-Contra Costa Transit Dist., supra,* 434 P.2d at 986-87.

[106] See, *e.g., Staub* v. *City of Baxley,* 355 U.S. 313 (1958); *Schneider* v. *State, supra; Lovell* v. *Griffin,* 303 U.S. 444 (1938); *cf. Flower* v. *United States,* 407 U.S. 197 (1972). The Commission itself described the same ban as "arbitrary" insofar as fundraising broadcasts were concerned, App. 272.

activities with other necessary social functions must be selected.[107] The total ban the licensees seek is the most restrictive, far beyond what is required for an orderly and balanced program schedule.

D. First Amendment Rights of Political Association As Well As of Speech are Abridged by a Policy Which Totally Bars a National Political Party from Purchasing Time To Discuss Public Issues.

Besides guaranteeing the freedom of speech, the First Amendment preserves "the right to band together for the advancement of political beliefs."[108] This Court has recognized the unique and vital role which the national political parties play in our system of government. *Cf., e.g., O'Brien* v. *Brown,* 41 U.S.L. WEEK 4001 (U.S. July 7, 1972). Virtually since the beginning of our constitutional democracy, this Nation has employed political parties as a necessary adjunct to the electoral process. A Committee of the American Political Science Association has called them "indispensable instruments of government."[109] As "mobilizers of both democratic consent and democratic dissent,"[110] the major parties are "not therefore merely appendages of modern government; they are in the

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[107] See, *e.g., United States* v. *Robel,* 389 U.S. 258, 265 (1967); *NAACP* v. *Button, supra,* 371 U.S. at 438 (1963); *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960); *cf. Dunn* v. *Blumstein,* 405 U.S. 330, 343 (1972) (voting rights).

[108] *Hadnott* v. *Amos,* 394 U.S. 358, 364 (1968). See also, *e.g., NAACP* v. *Button, supra; NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449 (1957); *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250-251 (1957).

[109] TOWARD A MORE RESPONSIBLE TWO PARTY SYSTEM 15 (1950).

[110] F. SORAUF, PARTY POLITICS IN AMERICA 23 (1968).

center of it and play a determinative and creative role in it." [111]

Talk by political parties is more than just political talk. It is the catalyst that produces peaceful governmental change. Free political discussion assumes "that government may be responsive to the will of the people and that changes may be obtained by lawful means." [112] The parties "are perhaps best fitted of all agencies to convert formless hopes or frustrations into proposals that can be understood, debated, and, if found appealing, approved by the people." [113]

Today a major political party cannot be barred from purchasing time on television, except by arbitrary will of the networks, and still fullfill its role. "Broadcasting, and television in particular, has indeed become indispensable to the political process of our nation." [114] A party without access to television is a party rendered partially impotent. "In a highly communicative world, access to the communications broadcast resource is partially equivalent to political power." [115]

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[111] E. SCHATTSCHNEIDER, PARTY GOVERNMENT 1 (1942); see also C. MERRIAM & H. GOSNELL, THE AMERICAN PARTY SYSTEM 1 (1969); J. JAMES, AMERICAN POLITICAL PARTIES 39 (1969).

[112] *Stromberg* v. *California*, 283 U.S. 359, 369 (1931); see also *Roth* v. *United States*, 354 U.S. 476, 484 (1957), holding that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people."

[113] C. ROSSITER, PARTIES AND POLITICS IN AMERICA 50 (1967).

[114] H.R. REP. No. 91-257, 91st Cong., 1st Sess. 6 (1969); see also S. REP. No. 91-751, 91st Cong. 2d Sess. 5 (1970); MCNEIL, THE PEOPLE MACHINE: THE INFLUENCE OF TELEVISION IN AMERICAN POLITICS (1968).

[115] Baran, *On the Impact of the New Communications Media Upon Social Values*, 34 LAW & CONTEMP. PROB. 244, 249 (1969).

The tasks of a major political party are not limited to soliciting funds.[116] They are not confined to the weeks before an election. When to seek the electorate's political and financial support is a judgment which must be by the party, not by the networks. If the networks usurp the parties' necessary role, the parties and the political process will be correspondingly weakened.

The alternatives are not attractive to contemplate. At the least, groups would be encouraged to engage in sensational or outrageous conduct in order to create the kind of photogenic "happenings" which are likely to be shown on television as "news." At the worst, significant numbers of persons might come to believe themselves so closed off from access to peaceful political discussion that they would opt for violence instead. As the Court of Appeals for the Second Circuit observed in invalidating a ban on public issue advertising by the administrators of a publicly owned bus terminal,

> "We should in these times be mindful that to the extent we secure legitimate and orderly access to means of communication for all views, we create conditions in which there is no incentive to resort to more disruptive conduct." [117]

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[116] Televised appeals for funds have been effective. One appeal by then Republican Chairman Dean Burch in 1964 produced 70,000 letters and 3500 money orders in three days. See Alexander & Meyers, *The Switch in Campaign Giving*, FORTUNE, November 1965, p. 212. A handful of network solicitations in 1968 produced nearly $800,000 for Senator Humphrey. App. 21. The Democratic Party's 1972 Telethon reportedly has produced pledges of approximately $5,000,000. Every commission and task force which has studied the subject has concluded that broadening the base of political contributions, as television can do, is desirable. See, *e.g.*, TWENTIETH CENTURY FUND, COMMISSION ON CAMPAIGN COSTS IN ELECTRONIC ERA, VOTER'S TIME 44 (1969). The Commission agrees. *Lawrence M. C. Smith*, 25 P. & F. RADIO REG. 291, 293 (1963).

[117] *Wolin* v. *Port of New York Authority*, 392 F.2d 83, 93 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

If the DNC were an advertiser demanding time to sell soapflakes or razor blades, that would be another case. If the DNC were claiming a right to preempt any time it wanted for its messages, that would be another case. If the DNC were claiming a right to unlimited amounts of time, or a right to time without reasonable restrictions, that would be another case. If the DNC were claiming a right to disrupt programming schedules, that would be another case. If the DNC were claiming a right to space in media which operate using private resources, rather than on physically limited channels established by and belonging to the public, that would be another case. And if the DNC were not seeking to promote and maintain a system of political communication and organization which the Court has said is constitutionally protected, that would be another case.

But all the Democratic National Committee asks is that to some reasonable degree, the opportunity to contact the public directly over the public's airwaves at the going commercial rate be kept open. To recognize this First Amendment need is to do no more than preserve the necessary political dialogue which is "the essence of self-government." *Garrison* v. *Louisiana*, *supra*, 379 U.S. at 75.

E. Permitting Some Paid Discussions By Political Parties Will Avoid Governmental Censorship and Will Not Present Serious Administrative Problems.

As previously noted, the policy for which the Democratic National Committee argues and which the Court of Appeals upheld holds no surprises: the Commission and the industry have tried it before, for many years, with no ill effects whatsoever.[118] Yet the net-

[118] See pp. 19-26, *supra*.

works claim that to require of them something more than a flat, arbitrary ban on paid broadcasts on public issues would involve the Government too deeply in their activities and put in jeopardy their First Amendment rights. Such arguments, of course, are familiar. They have been raised by broadcast licensees against the important attempts to regulate their activities since the Communications Act was passed, and have been consistently rejected by this Court. See, *e.g.*, *Red Lion, supra; National Broadcasting Co.* v. *United States, supra.* A sufficient answer was given by this Court three years ago in *Red Lion,* when it said that in the unique broadcast medium, to require licensees to exercise their trust consistently with First Amendment objectives, "enhance[s] rather than abridge[s] the freedoms of speech and press protected by the First Amendment." [119]

But the intervenors' arguments are even less apt in this case than they were when they attacked the fairness doctrine in *Red Lion.* The relief ordered in the present case—that the Commission draw reasonable rules which do not totally bar purchase of time by responsible persons to discuss public issues—does not threaten to involve the Commission deeply in program content. On the contrary, unlike the fairness doctrine, permitting some purchase of time promotes robust discussion not through government monitoring of program content, but rather through the system of private ordering. It does not place total reliance on governmental threats or raised eyebrows to make the licensees do their job. Instead, it looks to the persons who are advocates to present topics of debate, subject to the

[119] 395 U.S. at 375.

general guidelines the Commission may deem appropriate. To complement the managed economy of the fairness doctrine, it offers in the context of the broadcast medium something approaching the "free trade in ideas" which is what the First Amendment is all about.

No one is suggesting any limitation on the right of broadcast journalists to report, analyze and interpret the events of the day. The court below fully recognized the need to accommodate the free speech interests of the broadcast licensees themselves. It concluded that those interests did not require them to use completely every minute of every broadcast day, and that those interests were less compelling in time that the licensees had already put up for sale to others. It directed the Commission to take the licensees' legitimate interests into account in formulating appropriate regulations, and to leave "room for broad exercise of the broadcasters' discretion."[120] In any event, the free speech rights of the broadcast licensees, as this Court has held, are not absolute. "The right of free speech of a broadcaster . . . does not embrace a right to snuff out the free speech of others." *Red Lion, supra,* 395 U.S. at 387.[121]

Since the DNC is asking, not for free time, but simply to buy at the going rate, no economic loss to the

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[120] App. 464, 484.

[121] This Court has ordered even a newspaper to grant access for paid advertisements under appropriate circumstances. See *Lorain Journal Co.* v. *United States,* 342 U.S. 143 (1951). *Cf.* the compulsion sometimes imposed to provide broadcast time to a particular individual. *Cf. Nicholas Zapple,* 23 F.C.C. 2d 707 (1970). The Commission last year over licensee protests entered an order requiring licensees to set aside one hour of prime time each evening for access for programs not being transmitted by a network. 47 C.F.R. § 73.658(k). The licensees have generally used that hour for re-runs of old network crime and situation-comedy shows. *Cf.. e.g., TV Channels,* Washington Post, Aug. 6, 1972, *passim.*

licensees is involved. Perhaps the licensees fear that broadcast of announcements on political matters might lessen their ability to appeal to the widest possible number of viewers, and thereby lessen audience ratings and possibly advertising revenues from other advertisers. The concern is speculative. The licensees appear to have survived the broadcasting of paid political messages during political "campaigns" without lasting ill effect. Moreover, it is not the maximizing of licensee revenues, but the interest of the viewers, which is paramount. And in any event, the Court of Appeals specifically required the Commission to be sure that the licensees were protected from actual financial harm.[122]

The licensees might fear that broadcasting of paid announcements by proponents of political views might trigger a fairness obligation to broadcast opposing views even if the opponents cannot pay. The answer to this is, first, that any such obligation is one of general fairness, not the rigid equal time requirement for candidates under § 315, so that the Commission can formulate rules to keep the reply right doctrine within reason; second, that the viewers' interest is paramount, and if any revenue loss cannot be absorbed in other charges and becomes crippling, there will be as this Court said in *Red Lion,* "time enough to reconsider;"[123] finally, that this Court has never had occasion to declare that there is a free right to reply to paid advertising, and the lower courts have applied such a doctrine extremely sparingly.[124]

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[122] App, 486. Licensees appear to have weathered the broadcasting of paid political announcements prior to elections without ill effect.

[123] 395 U.S. at 393.

[124] *Cf., e.g., Green* v. *FCC*, 447 F.2d 323 (D.C. Cir. 1971). Anti-smoking commercials were shown only about one-fifth as frequently as cigarette advertisements. Jaffe, *supra* n. 68, at 779.

Nor is there any basis whatsoever for the assertions by the networks that unless they have arbitrary power to ban all paid messages on public issues, the wealthy will buy up all the time. The Court of Appeals noted specifically that invalidation of the flat ban "does not close the door to 'reasonable regulations' designed to prevent domination by a few groups or a few viewpoints." [125] Many regulatory means are possible, and they can be modified if necessary.

The intervenors' forecasts of chaos come with particular ill grace since the very purpose of their seeking certiorari was to prevent any effort to develop reasonable rules as mandated by the Court below.[126] Their alarms seem all the more extravagant in light of their unfulfilled prophecies of doom in the past. In 1968 in *Red Lion* CBS told this Court that "the [fairness] rules, if upheld, would deter the broadcast of views on controversial issues" and "would have an insidious, if not totally destructive, effect upon many of these programs." [127] Nevertheless, today the same network uses no less than 195 pages of the printed record of this case in attempting to demonstrate that since (and apparently in spite of) the *Red Lion* decision "in quality as well as quantity, CBS has served the public increasingly well." [128] As for the Commission's complaints that formulating a rule will be a difficult task and lead to disputes, the court of appeals most experienced in reviewing the Commission's activities remarked in a related context, "The

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[125] App. 485.

[126] The Commission's brief concedes, at p. 58, that some of the disasters predicted "Perhaps . . . [are] not inevitable."

[127] Brief for Respondent Columbia Broadcasting System, Inc., No. 717, October Term, 1968, at 1-2, 4.

[128] App. 52; 48-242.

fears of regulatory agencies that their processes will be inundated . . . are rarely borne out." *Office of Communication of United Church of Christ* v. *FCC,* 359 F.2d 994, 1006 (D.C. Cir. 1966) (Burger, J.). And in any event this Court has said that when an agency has failed in its duty to safeguard rights it is charged to protect, "no room was left for administrative or expert judgment with reference to practical difficulties." *Boynton* v. *Virginia,* 364 U.S. 454, 459 (1960).

The fact is that there are no administrative obstacles here which the Commission cannot handle. That, after all, is the Commission's function; and all the court below asked was that it try. Any commission that feels itself competent to evaluate broadcast licensees in light of a standard of the "public convenience, interest or necessity," and to administer a doctrine of "fairness," surely must have enough administrative skill on hand to devise a reasonable way to permit a political party occasionally to buy time to talk directly with the public. The Commission's sudden modesty is both unprecedented and unbecoming.[129]

In short, the reports that the death of free broadcasting is imminent are greatly exaggerated. As this Court responded to similar claims in *Red Lion,* "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quantity of coverage, there will be time enough to reconsider the constitutional implications." 395 U.S. at 393. That wise forbearance is even more appropriate where, as here, the Commission's rule has not yet even been formulated.

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[129] See *United Broadcasting, supra,* 10 F.C.C. at 518, where the Commission rejected the same arguments of administrative difficulty it today embraces.

F. The Ruling of the Commission is Subject to First Amendment Standards.

1. The Commission's Interpretation of Its Constitutional Responsibilities Is Subject to Judicial Review.

The intervenors in this litigation, CBS and ABC, (but not the Solicitor General or the Commission) devote considerable space in their briefs to arguing that their exclusionary policies do not involve "state action." The intervenors' analogies are beside the point. The issue here is whether the Federal Communications Commission is doing its job.[130]

When the Commission ruled that its policy was to uphold an absolute ban on the sale of time for political discussion, the DNC brought an action against the Commssion in the court below seeking review. CBS and ABC intervened, contending that their particular exclusionary rules were their business, a totally private decision. But what the DNC has maintained throughout is that the Commission's action does not square with the mandates of both the Communications Act and the First Amendment; and there can be no doubt that the Federal Communications Commission

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[130] Nor can it be assumed that the entire body of doctrine concerning the Fourteenth Amendment, beginning with the *Civil Rights Cases*, 109 U.S. 3 (1883), is to be applied mechanically and without analysis in totally different circumstances which do not involve that amendment at all, but rather the First Amendment—a provision framed at a different period in history, with different purposes on which depends the very functioning of our governmental system. CBS seems to concede that the "state action" limitations of the Fourteenth Amendment may not apply to the First in the same fashion—but asserts, without giving reasons, that the scope of the First Amendment, which protects "preferred" rights, is nevertheless to be more limited. See Brief for Petitioner Columbia Broadcasting System, Inc., at 23; see generally pp. 78-81, *infra*.

is subject to both. The intervenors, by injecting themselves into the dispute between the DNC and the Commission, cannot convert this litigation into a suit solely between private parties [131] and thereby bootstrap their right to intervene into a constitutional basis of decision.

The intervenors' curious argument would immunize from constitutional safeguards nearly all decisions by administrative agencies which authorize actions by regulated firms. For if an FCC order permitting the banning of paid political messages is not reviewable on statutory and constitutional challenge, what of a Federal Power Commission order granting a rate increase, or an Interstate Commerce Commission order permitting a discontinuation of service, or a Civil Aeronautics Board order granting a right to operate on a particular route? All of these are instances where a regulatory agency permits and

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[131] The intervenors (but not the Solicitor General or the Commission) cite two superannuated court of appeals decisions and a more recent ruling of a federal district judge as supporting their "state action" argument. The former two cases held simply that the plaintiffs had failed to exhaust their administrative remedies—that "the enforcement of the Act rests in the FCC and not in the district courts of the United States save for a right of review of the Commission's orders." The cases did not address total refusals to sell time to anyone to discuss "controversial issues"; and the loose dicta they contain are uninformed by more than twenty years of subsequent decisions by this Court. *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597, 600 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946); *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497, 500 (1st Cir. 1950). Finally, *Post* v. *Payton*, 323 F. Supp. 799 (E.D. N.Y. 1971), is not remotely in point; it held in a private suit for damages and injunctive relief that constitutional safeguards were not violated in an employment dispute when a licensee fired an employee for broadcasting alleged obscenities.

approves actions of the enterprises it regulates; but it has never been seriously contended that because those enterprises receive permission rather than direction, the order of the regulatory commission is thereby somehow immunized from judicial review on challenge by persons who are adversely affected by the order. The scope of such review is certainly no less when the agency is claimed to have violated the Constitution as well as its basic statute.[132]

Where the right of free speech is at stake, this Court has held that Government violates the First Amendment when it lends its authority to a system of private censorship. See *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58 (1963). Censorship is "hardly less virulent for being privately administered." *Smith* v. *California,* 361 U.S. 147, 154 (1939). This Court has held that governmental policies violate the First Amendment when they may tend unnecessarily to generate reticence and self-censorship by individuals. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279 (1964); *Bantam Books, Inc.* v. *Sullivan, supra; Speiser* v. *Randall,* 57 U.S. 513 (1958). The First Amendment's intended system of open discussion which those cases recognize cannot exist when the Commission endorses the censorship of the public's airwaves by its licensees.

The Commission's policy here is certainly more fraught with governmental involvement than was

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[132] *Cf., e.g., United States ex rel. Chapman* v. *FPC,* 345 U.S. 153 (1953) (suit to set aside FPC order permitting construction of dam by private company); *Henderson* v. *United States,* 339 U.S. 816 (1950) (suit to set aside ICC order permitting racial segregation in dining cars of private railroad company); *Parker* v. *Fleming,* 329 U.S. 531 (1947) (suit to set aside order of Price Administrator permitting private landlord to evict); *Mitchell* v. *United States,* 313 U.S. 80 (1941) (suit to set aside order permitting racial segregation by private railroad company).

true in *New York Times Co.* v. *Sullivan, supra,* where private plaintiffs sought damages for the injury done them by private individuals. For a state to permit libel plaintiffs to inhibit free speech by damage claims, this Court held, was sufficient governmental involvement to bring First Amendment guarantees into play. Here the governmental involvement is all the greater: the Government is not a neutral arbiter, but is an active party to the litigation arguing for the policy it has approved. Just as government may not enforce unconstitutional conditions devised by a third party on a transfer of real estate from a willing buyer to a willing seller, so it may not enforce the unconstitutionally restrictive policies of a third person—the Commission's licensee—on the communication between a speaker and his audience. *Cf. Shelley* v. *Kraemer,* 334 U.S. 1 (1948).

2. The Broadcast Spectrum Is Public Property, Use of Which Has Been Delegated Subject to Detailed Federal Regulation

The airwaves belong to the public.[133] That the resource is in the public domain is itself persuasive that actions using the property in question are subject to constitutional restrictions. This is not to say, of course, that every government lessee is subject in all activities to the restrictions the constitution places on governments. But where the license confers an exclusive right over federal property; where the licensee's very existence depends upon the federal award; and where the policy in dispute is one which is central to the operation of the political system, then constitutional restrictions cannot totally vanish. Many

[133] See pp. 51-52, *supra.*

state and federal courts have so held.[134] Nor can an administrator of a public resource, required to promote "the public interest," assert the same interest in idiosyncratic private behavior as could, for example, the proprietor of a small restaurant or boarding house.

In *Lloyd Corp.* v. *Tanner,* discussed *supra,*[135] this Court emphasized that public property and private property are subject to differing constitutional standards for access. Rejecting a claim of right to use a private shopping center, this Court noted that where property is publicly owned "it has often been held" that "access . . . for purposes of exercising [First Amendment] . . . rights cannot be denied absolutely."[136] Also, the *Lloyd* opinion noted that the handbilling there was not consistent with the principal function of the property—sales—whereas communication is the broadcast frequencies' reason for being. And whereas in *Lloyd* alternative avenues for handbilling existed—"on any *public* street, on any *public* sidewalk, in any *public* park, or in any *public* building in the city of Portland," [137] there are no alternative radio and television channels; the Commission's licensees control them all.[138]

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[134] See, *e.g., Kissinger* v. *New York City Transit Authority,* 247 F.Supp. 438 (S.D.N.Y. 1967) (advertising space on city busses); *Farmer* v. *Moses,* 232 F.Supp. 154 (S.D.N.Y. 1964); *Hillside Community Church, Inc.* v. *City of Tacoma,* 455 P.2d 350 (Wash. 1969); *Wirta* v. *Alameda-Contra Costa Transit Dist., supra.*

[135] See pp. 50-51, *supra.*

[136] 40 U.S.L. WEEK at 4832.

[137] *Id.* at 4833 (emphasis supplied).

[138] Compare *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968), where access to private property was held constitutionally required when the alternative avenues would not be as effective, given the subject involved. See also

3. The Government Intimately Regulates the Operations of Broadcast Licensees and Confers On Them Unique Privileges

In *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), this Court noted that an action by a licensed entity may stand on a different constitutional footing if it has the considered approval of the governmental regulatory agency. Such approval was absent in *Irvis*; but it had been present, the Court noted, in *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451 (1952), so that a street car company's commission-approved policy of broadcasting to passengers was subject to constitutional restrictions.[139]

The decisions of this Court make clear that when government undertakes to regulate in detail a practice or group of pratices of a regulated entity, to that extent the practice can no longer be treated as wholly private. Thus in holding the privately owned street-car system subject to the First and Fifth Amendments this Court said:

> "We . . . recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed. . . ." [140]

Marsh v. *Alabama*, 326 U.S. 501 (1946). Also unlike *Lloyd*, competing interests based on the constitutional guarantees of due process of law and that private property shall not be taken without just compensation are not involved here.

[139] See 407 U.S. at 175-76 n.3; 343 U.S. at 462.

[140] 343 U.S. at 462 (footnote omitted).

The regulation of broadcasting by the FCC is more pervasive than that by the District of Columbia Public Utilities Commission. After full consideration the FCC approved the policy in question here. And, unlike *Pollak,* this case concerns not an incidental activity of the streetcar company, but the primary activity of the regulated entity—communications. Moreover, as noted previously,[141] the licensees enjoy "a spectacular subsidy" from the government.

The Federal Communications Commission itself believes that its regulation of broadcasting is so pervasive that constitutional guarantees may affect even the employment practices of its licensees:

> "[A] substantial case has been made that because of the relationship of the Government of the United States to broadcast stations, the Commission has a constitutional duty to assure equal employment opportunity.... The contention is rested upon such decisions as *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961)."[142]

Consistently with this view of its involvement in the activities of licensees, the Commission has eschewed the "state action" arguments put forth by the intervenors in this case.

The issue in this case cannot be resolved by a mechanical search for governmental involvement. Clearly, the Government is involved in many ways in the policy of the broadcasters. The question is whether, in light of the policies and assumptions expressed in our Constitution, such governmentally-involved action can es-

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[141] See p. 52, *supra.*

[142] *Petition for Rulemaking, supra* n.92, 18 F.C.C. 2d 240, 241 & n.2 (1969).

cape all Constitutional restraints.[143] "Only by sifting facts and weighing circumstances" can the appropriateness of particular constitutional safeguards in a particular situation be determined. *Burton* v. *Wilmington Parking Authority, supra,* 365 U.S. at 722. Whether the Commission is correct in believing that the licensor-licensee relationship in broadcasting parallels in all respects the "symbiotic relationship" which existed in *Burton*,[144] so as to make employment practices also subject to constitutional safeguards, it is certainly not difficult to take the smaller step of concluding that as to their communications activities the broadcasters have tremendous governmentally-imposed obligations to the public.

> "The argument that a broadcaster is not a public utility is beside the point. True it is not a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper, or an automobile agency. . . . A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. . . . After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust . . . ." *Office of Communication of United Church of Christ* v. *FCC,* 359 F.2d 994, 1003 (D.C. Cir. 1966).

All that is asked of these "fiduciaries" is that they behave as such, and respect the interest in free speech of those whose trust they hold.

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[143] *Cf.* Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment,* 30 So. Cal. L. Rev. 208 (1957).

[144] *Moose Lodge No. 107* v. *Irvis, supra,* 407 U.S. at 175.

4. Constitutional Restrictions May Not Be Avoided by a Governmental Grant of Authority To Take Unconstitutional Action, Particularly When the Grant Contradicts Previous Governmental Policy.

This Court has held that in certain circumstances when a governmental agency gives affirmative approval to action it could not itself constitutionally take, that action nevertheless is subject to constitutional restrictions. See *Evans* v. *Newton,* 382 U.S. 296 (1966); *Lombard* v. *Louisiana,* 373 U.S. 267 (1963); *compare Shelley* v. *Kraemer,* 334 U.S. 1 (1948), *with Buchanan* v. *Warley,* 245 U.S. 60 (1917).

Similarly, constitutional protections may not be avoided by government's granting permission to a third party to do what it may not do itself. In *McCabe* v. *Atchison, T. & S.F. Ry.,* 235 U.S. 151 (1914), a state statute authorized rail carriers to provide cars for white passengers but not for blacks. This Court made clear that in refusing service to blacks under this purely permissive statute, the railroad was "acting in the matter under the authority of a state law." 235 U.S. at 162. As this Court described the *McCabe* case, "This was nothing less than considering a permissive state statute as an authorization to discriminate and as sufficient state action to violate the Fourteenth Amendment in the context of the case." *Reitman* v. *Mulkey,* 387 U.S. 369, 379 (1967). Similarly, in *Nixon* v. *Condon,* 286 U.S. 73 (1932), when the state empowered the executive committee of a political party to prescribe voting qualifications for party members, this Court through Mr. Justice Cardozo held that the committee's action in barring blacks from voting was an expression of state authority which violated the Fourteenth Amendment. See also *Railway Employes' Dept.* v. *Hanson,* 351 U.S. 225 (1956), in which this Court held

that constitutional safeguards applied to a union contract when federal law made possible a union shop, even though "the union shop provision of the Railway Labor Act is only permissive." *Id.* at 231. When the most fundamental liberties of the people are at stake, the Government cannot vest its authority in another and then like Pilate proclaim its innocence. To their credit, the Government and the Commission do not attempt to do so in this case.

The present case, involving as it does the manner in which the licensee performs the very activity for which it is licensed, is an even clearer instance of governmental responsibility than was *Burton* v. *Wilmington Parking Authority, supra.* This court in *Burton* concluded that government had "elected to place its power, property and prestige behind the admitted discrimination" and by "its inaction . . . made itself a party to the refusal of service." *Id.* at 725. "[N]o state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be."[145] *Ibid.* Neither may the Federal Communications Commission.

Moreover, government may not change the rules, and then claim no responsibility for the policy which this

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[145] See also *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 726-727 (Stewart, J., concurring): "The highest court of Delaware has thus construed this legislative enactment as authorizing discriminatory classification based exclusvely on color. Such a law seems to me clearly violative of the Fourteenth Amendment." *Id.* at 729 (Harlan, J., dissenting): "If in the context of this record this means, as my Brother STEWART suggests, that the Delaware court construed this state statute 'as authorizing discriminatory classification based exclusively on color,' I would certainly agree, without more, that the enactment is offensive to the Fourteenth Amendment."

change would permit. In *Reitman* v. *Mulkey*, 387 U.S. 369 (1967), a change in state law was held in the circumstances to implicate the state sufficiently to invoke constitutional limitations. Here the Federal Communications Commission has attempted to depart from its previously settled policy in *United Broadcasting Co.* and subsequent cases.[146] Such a change of policy to permit a licensee arbitrarily to ban political parties from purchasing time to discuss public issues is not an instance of governmental neutrality sufficient to avoid the Constitution.

5. The First Amendment Does Not Permit Absolute Barring or Censorship by Broadcast Licensees of Paid Discussions of Public Issues.

This case involves not the Fourteenth Amendment, but the First. The First Amendment mandates a system of free and open discussion which this Court has held is an essential part of the functioning of our governmental system. See, *e.g.*, *Stromberg* v. *California*, *supra*. In making the delicate judgments required to determine the circumstances in which activities are subject to constitutional restrictions, this Court has given broader sweep to constitutional protection of the governmental process itself, particularly the process of peaceful change. Thus in *Smith* v. *Allwright*, *supra*, when a state allowed a private group to make basic decisions in its electoral process, this Court found a violation of the Fifteenth Amendment, observing that "Constitutional rights would be of little value if they could be thus indirectly denied." 321 U.S. at 664. And in *Terry* v. *Adams*, *supra*, four Justices stated that when the form of the electoral process was such that a private political group was "the decisive power in the country's recognized political process," it "takes

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[146] See pp. 19-26, *supra*.

on those attributes of government which draw the Constitution's safeguards into play."[147] Three other Justices agreeed that

> "It is immaterial that the State does not control that part of the elective process which it leaves for the Jaybirds to manage. The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern . . . ."[148]

And in the leading decision on application of the First Amendment to a federal licensee, the Amendment was held to apply directly. *Public Utilities Comm'n* v. *Pollak, supra.*

What these cases mean is that where there is dominant power to control the openness of the political process, particularly power to restrict the activities of a major political party, the Constitutional guarantees which protect the governmental process apply. They apply even when the process has not yet reached the formal stage. If it were otherwise, the process of peaceful change through orderly governmental procedures could itself be impaired, and there would be no effective remedy. *Cf. Baker* v. *Carr,* 369 U.S. 186, 258 (1962) (Clark, J., concurring).

Red Lion held that broadcast licensees are not so private that they may present only one side of an issue. "[T]here is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." 395 U.S. at 392. The opinion leaves no doubt that fairness rules are constitu-

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[147] 345 U.S. at 484 (opinion of Clark, J.).

[148] *Id.* at 469 (opinion of Black, J.).

tionally required.[149] It seems unlikely that any court would hold that broadcast licensees might constitutionally refuse to sell time to blacks, or to women, or to Southereners. Or that they might charge advocates of some views higher rates than others. Is CBS so private that it could refuse to sell any time to a Jew because of his ethnic background and argue that it was up to him to prove that a fair quota of Jews had not been seen on its other broadcasts? The proposition seems absurd, and yet it follows equally from the logic by which networks claim the "private" right to show a major American political party on their own terms, in aspects they think important, eye-catching or colorful, and arbitrarily to deny it all opportunity to purchase time to speak for itself. The answer was given in *Red Lion:* "[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment."[150]

The power of the electronic media continues to increase and to influence the political process. Yet the networks now say they have no obligation to the First Amendment. This Court has traditionally spurned that "refined and metaphysical reasoning" which asks it to "explain away the constitution" and ignore the realities of its time. *Gibbons* v. *Ogden,* 9 Wheat. 1, 222 (1824). There is no reason here to "explain away" the First Amendment. The power and the responsibili-

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[149] See 395 U.S. at 390. *Accord, Jaffe, supra* n.68: "The Court held that the fairness doctrine, and even a right to command time, is not only tolerated by the First Amendment but is required by it." 85 HARV. L. REV. at 774 (footnote omitted). See also *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945).

[150] 395 U.S. at 390.

ties of broadcasting were clear almost from the start. Herbert Hoover foresaw them half a century ago:

> "Radio has passed from the field of an adventure to that of a public utility. Nor among the utilities is there one whose activities may yet come more closely to the life of each and every one of our citizens, nor which holds out greater possibilities of future influence, nor which is of more potential public concern."[151]

The potential for influence has been realized. The responsibilities must be, too.

CONCLUSION

For the reasons stated the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Democratic National Committee

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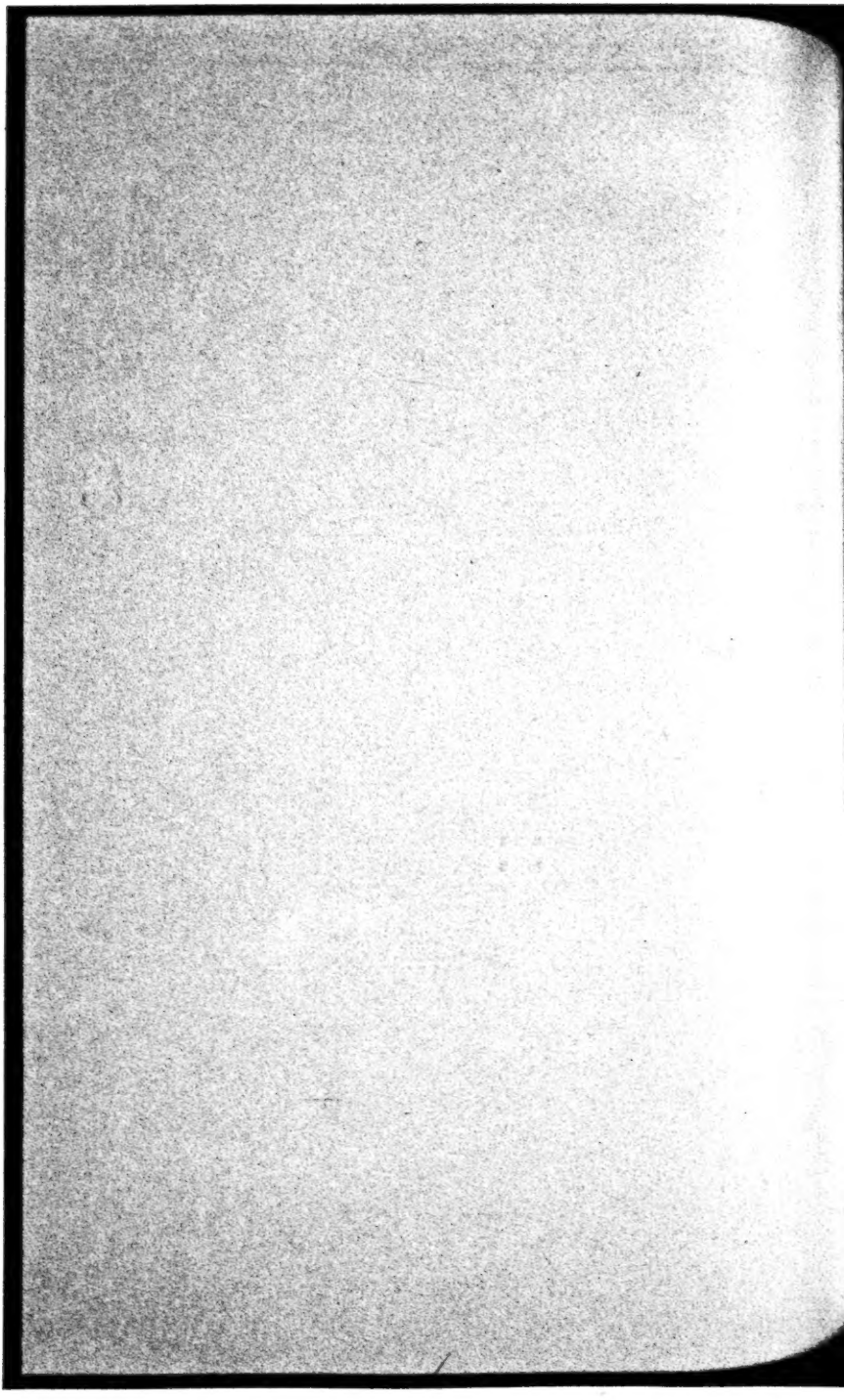
[151] U. S. DEPT. OF COMMERCE, RECOMMENDATIONS FOR REGULATION OF RADIO 2 (1924).



ADDENDUM

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Section 3(h) of the Communications Act of 1934, 48 Stat. 1065, as amended, 47 U.S.C. § 153(h), provides:

> " 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

Section 301 of the Communications Act of 1934, 48 Stat. 1081, 47 U.S.C. § 301, provides in relevant part:

> "It is the purpose of this chapter . . . to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by

Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions and periods of the license."

Section 303 of the Communications Act of 1934, 48 Stat. 1082, as amended, 47 U.S.C. § 303, provides in relevant part:

"Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * *

"'(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

* * *

"(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter. . . .

Section 307 of the Communications Act of 1934, 48 Stat. 1083, as amended, 47 U.S.C. § 307, provides in relevant part:

"(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

* * *

"(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor a renewal of such license may be granted from

time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. . . . Consistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action. . . ."

Section 309(a) of the Communications Act of 1934, 48 Stat. 1085, as amended, 47 U.S.C. § 309(a), provides in relevant part:

"Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 47 U.S.C. § 315(a), provides:

"If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that

office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

"(1) bona fide newscast,

"(2) bona fide news interview,

"(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

"(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Section 326 of the Communications Act of 1934, 48 Stat. 1091, as amended, 47 U.S.C. § 326, provides:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."